Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CONYERS COMMUNITY CHURCH, INC.
and KENNETH L. CROCKER,

Petitioners,

v.

RAY AND PEGGY STEVENS, DEXTRAL AND
ROSALYN AUSTIN, JOHN AND BENNETTA KIKER,
RAYMOND W. AND CAROLE KAY FINN,
GAIL WOMMACK, and JERRY DODD,

Respondents.

On Petition for a Writ of Certiorari To The Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether First Amendment protections only require deference to the highest decisionmaking body of *denominational* churches, and not of independent churches as here, so that civil courts may disregard the expressed will of the supermajority of a church's governing board and of the supermajority of its congregation, and judicially override church determinations about the identities of trustees, the identities of members, the church's religious activities, the church's grants of assets, the governing board's right to meet, and the church's right to pay legal expenses to defend itself.

2. Whether First Amendment protections are waived and lost by independent (congregational) churches that are incorporated (as are virtually all congregational and hierarchical churches today), as the Georgia courts ruled here.

3. Whether the First Amendment no longer bars "departure from doctrine" analysis and allows courts to treat a minority as the majority because the majority allegedly departed from doctrine in the form of the corporate purposes.

4. Whether First Amendment protections bar civil courts from placing a church's assets in receivership and exercising control over them and bar a jury to overriding the Church's supermajority votes regarding the disposition of those assets, as the trial court and jury did here.

5. Whether the First Amendment and this Court's decisions no longer apply to give a church the right to

determine for itself the composition of its governing board and congregation.

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Petitioners CONYERS COMMUNITY CHURCH, INC.[1] and KENNETH L. CROCKER respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Georgia entered in this proceeding on August 25, 1993 (and allowed to stand by the Supreme Court of Georgia's denial of certiorari on December 3, 1993).

OPINIONS BELOW

The decision of the Supreme Court of Georgia denied Petitioners' Petition for Certiorari (Appendix II at A-19) on December 3, 1993, and is unpublished. The Court of Appeals of Georgia had reversed the trial court's rulings against Petitioners on some issues, but had affirmed the trial court's rulings on the remaining issues, and that decision is reported at 210 Ga. App. 231, 435 S.E.2d 690 (1993) (Appendix I at A-1).

JURISDICTION

The judgment of the Supreme Court of Georgia is dated and was entered on December 3, 1993 (Appendix II at A-19). Accordingly, the deadline for this Petition is March 3, 1994.

This Court's jurisdiction lies under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the U.S. Constitution, which state in pertinent part:

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[1]Conyers Community Church, Inc. has no parent or subsidiary company to be listed pursuant to Rule 29.1.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Three months after the Church congregation and board voted by supermajorities to approve various dispositions of the proceeds from the sale of the Church property, a small minority of Church members (some of whom had not attended the congregational meetings or had chosen not to vote), together with three non-members who had not attended and not voted (and clearly lacked standing), sued the Church and the Pastor to set aside the Church's majority decisions.

In spite of petitioners' First Amendment objections, the Superior Court of Rockdale County placed the Church's assets into an *involuntary receivership*, barring the Church from using its assets except for several months of pay for Rev. Crocker (followed by two years without pay) (Appendix IV at A-36, 37-39), and subsequently denied the Church's motion for summary judgment that asserted the Church's First Amendment protections. (Appendix II at A-27, 28-31.) This *barred the Church from paying attorneys to defend itself*, and the Superior Court continued the bar after trial. The Superior Court then *prohibited the Board from meeting* to correct procedural flaws alleged by the minority or to otherwise act.

Just before trial, the minority amended its Complaint to accuse Rev. Crocker, for the first time, of fraud, in order

to attempt to recover attorney's fees.

Over the Church's repeated First Amendment objections, a *jury trial occurred on the legitimacy of the supermajority Church votes* on the disposition of the Church's property. At the close of the minority's case, petitioners' motion for a directed verdict on First Amendment and other grounds was denied. Despite respondents' unconstitutional actions, the jury returned a *verdict primarily in favor of the Church and Rev. Crocker* (on 76% of the contested payments to Rev. Crocker), but against the Church on its remaining assets. The jury awarded $200,000 and the parsonage to Rev. Crocker (valued at approximately $70,000), but awarded to the minority $85,616.37 and "the remainder" of the balance of Church funds and other property. The Superior Court later determined "the remainder" to be $207,801.63, by *resolving every disputed point against the Church* and in favor of the minority, even to the point of awarding all accrued interest to the minority even though some of that interest accrued on the portion of the funds the jury awarded to Rev. Crocker! (Appendix II at A-23.) The Superior Court denied every one of the Church's post-trial motions, and denied the Church's and Pastor's and their attorneys' motion for reimbursement of their attorney's fees out of the Church's own assets, despite clear mandatory indemnification law.

The Court of Appeals of Georgia reversed the Superior Court on two issues, holding that the Pastor was entitled to (i) a proportionate share of the accrued interest on the receivership funds and (ii) partial mandatory indemnification

of the costs he incurred in successfully defending against the minority's claims. (Appendix I at A-1, 13, 15.) On the remaining appeal issues, including the Church's First Amendment jurisdictional arguments, the Court of Appeals affirmed the Superior Court. (Appendix I at A-1, 4-10.) The gravamen of the Court of Appeals' decision was that the First Amendment did not preclude the minority's and the Superior Court's actions "*[i]nasmuch as the church chose to incorporate under the Georgia Nonprofit Corporation Code*"! 210 Ga. App. at 235, 435 S.E.2d 690 (Appendix I at A-8.) The Court of Appeals then denied petitioners' motion for reconsideration. (Appendix III at A-35.)

The Supreme Court of Georgia denied petitioners' petition for certiorari. (Appendix II at A-19.)

B. STATEMENT OF FACTS

Conyers Community Church, Inc. was an independent church in Conyers, Georgia, formed in 1976. The Pastor of the Church from its founding until its congregation informally disbanded in February 1990 was Rev. Kenneth L. Crocker. Rev. Crocker was ordained in the Assemblies of God denomination in 1956 and has pastored small churches for more than 30 years.

The governing authority of the Church was the Board of Trustees, pursuant to the Articles of Incorporation, though the Board often submitted important issues to the congregation for advisory votes. The Church corporation was not a membership corporation and members of the congregation therefore had no decision-making authority.

As of January 1988, the Board of Trustees consisted of

six members. At different times over the next year, two of the trustees moved out of state and resigned, as the minority stipulated at trial. In mid-1989, Trustee (and appellee) Ray Stevens, who had earlier left the Church, resigned expressly and then by joining a different church in November, 1989. As of October, 1989 and up through the present, the Board of Trustees consisted of the remaining three members: Bob Withers, Rev. Crocker, and his son-in-law Ron Jansen.

As most small independent churches do, the Church struggled financially. From time to time over the years, Rev. Crocker loaned the Church money of his own to keep it operating and also went without salary for extended periods. In early 1988, the Church formalized its indebtedness to Rev. Crocker by a second mortgage, *unanimously* approved by the Board (*including appellee Stevens*) and the congregation, in the amount of $131,142.00 plus interest at 10%.

Nearly two years later, its finances never having improved, the Church agreed unanimously at an October 8, 1989 meeting to sell its property to a commercial buyer for $725,000.[2] The Board also agreed. (The congregation initially planned to build a smaller building elsewhere with the sale proceeds, but it later became clear that not a sufficient number of members would commit to remaining with the Church to make rebuilding realistic until some future date.)

On December 17, 1989, two days before the sale closing,

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[2]Thus, the Court of Appeals was incorrect in stating that only the Church Board decided to sell the realty. 210 Ga. 231, 435 S.E.2d 690 (Appendix I at A-1).

the congregation *unanimously* approved the sale again, *unanimously* approved the previously agreed-to payoff of the second mortgage, *unanimously* voted to freeze the membership roll of the Church and to identify the 23 members in good standing at that time, and *unanimously* approved Rev. Crocker's receipt of a portion of the real estate commission on the sale (the full amount of which would have to be paid to someone in any event). The Board *unanimously* approved the same actions.

The sale then closed on December 19, 1989. After paying the first and second mortgages and all closing costs, the Church received $328,895.65. Other Church expenses continued, however, and required the expenditure of at least $22,558 between December 19, 1989 and February 18, 1990 for utilities, parsonage mortgage payments, salary, insurance, and so forth.

On February 18, 1990, the congregation held what became its final meeting. By a *supermajority* vote of 13-3, it ratified retirement benefits for the Pastor and his wife (the co-pastor): a lump sum of $100,000 along with the parsonage, repaired and mortgage-free. The Pastor and his wife were at retirement age without ever having had a retirement plan. By a *supermajority* vote of 12-4, the congregation ratified continuation of the Church corporation under the direction of the Board of Trustees,[3] to carry on a radio, tape,

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[3]Thus, the Court of Appeals was incorrect in stating that the Pastor retained control of the funds that were to be used to carry on the Church's ministries. 210 Ga.

newsletter, and missionary ministry, pending a hoped-for re-assembly of the congregation, if possible, in the future.[4] The Trustees had previously approved all of these actions *unanimously*.

Three months later, a minority of *seven* Church members (some of whom had not attended the congregational meetings or had chosen not to vote), together with three non-members who had not attended and not voted (and clearly lacked standing but were added to make the small minority look larger), sued the Church and the Pastor to set aside the Church's majority decisions.

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at 231, 435 S.E.2d 690 (Appendix I at A-2).

[4]The amount remaining from the sale proceeds to be devoted to the continuation of the ministry was approximately $172,300 ($725,000 sale price minus $164,070 first mortgage, minus $75,418 closing costs, minus $156,616 second mortgage, minus $22,558 church operating expenses from December 19, 1989 to February 18, 1990, minus $100,000 retirement benefit, minus $34,038 parsonage mortgage).

REASONS FOR GRANTING THE WRIT

In the decision below, the Georgia courts took their third strike on church dispute law. (*Jones v. Wolf* and *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church* were the Georgia courts' first two strikes.)

The Georgia Court of Appeals' decision in this case is a glaring First Amendment anomaly, and a defiant refusal to play by the constitutional rules. For the first time *ever*, in *any* jurisdiction, incorporated churches have been segregated from the long-standing categories used in First Amendment analysis (hierarchical and congregational) and have been relegated to a new third-class status under the First Amendment. Under the Georgia Court of Appeals' decision, churches that have incorporated (which virtually all churches have, in Georgia and in every other state) have *waived or forfeited the normal protections of the First Amendment*! Unlike all of the churches in this Court's First Amendment cases, under the Georgia Court of Appeals' decree, incorporated churches' internal decisions are now entitled to no deference from the civil courts. Using the same rationale, incorporated newspapers lose their high protection of freedom of the press, and incorporated cause organizations lose their high protection of freedom of speech.

The Georgia Court of Appeals' erroneous construction of the First Amendment will have a dramatic and negative impact on virtually every church in that state and in this country, requiring this Court's review and correction. The anomalous view of incorporation is only one of a series of constitution-

al blunders in the opinion below, including some direct contradictions of this Court's express language in *Jones v. Wolf* and *Presbyterian Church v. Hull Presbyterian Church.*

I. THE FIRST AMENDMENT REQUIRES DEFERENCE TO A CHURCH'S HIGHEST DECISIONS ABOUT RELIGIOUS DISPUTES, WHETHER THE CHURCH IS HIERARCHICAL OR CONGREGATIONAL, AND THEREFORE PRECLUDES THE CIVIL COURTS FROM EXERCISING JURISDICTION TO REDETERMINE THE HIGHEST BODY'S DECISIONS.

The First Amendment erects strong barriers to civil courts' review of church decisions, whether those decisions involve church government or faith and doctrine. "Religious questions" into which the civil courts may not inquire include a wide range of issues:

1. "[M]atters of *church government* as well as those of faith and doctrine";
2. "[R]eligious doctrine, *polity, and practice*"; and
3. "[M]atters of discipline, faith, *internal organization*, or ecclesiastical rule, *custom*, or law."

Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 448 (1969) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1954)); *Jones v. Wolf*, 443 U.S. 595, 603 (1979); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976).[5]

This Court has made that constitutional principle of restriction very clear in two cases that arose under Georgia

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[5]Throughout this Petition, all emphasis is added unless otherwise noted.

law and that involved *hierarchical churches*:

> It is . . . clear . . . that "the First Amendment *severely circumscribes the role that civil courts may play in resolving church property disputes." Most importantly, the First Amendment prohibits* civil courts from resolving church property disputes on the basis of religious doctrine and practice. As a corollary to this commandment, *the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization.*

Jones v. Wolf, 443 U.S. 595, 602 (1979) (quoting *Presbyterian Church*, 393 U.S. at 449).

> [The First Amendment embodies] a spirit of freedom for religious organizations, an independence from secular control or manipulation -- in short, *power to decide for themselves, free from state interference, matters of church government* as well as those of faith and doctrine.

Presbyterian Church, 393 U.S. at 448 (quoting *Kedroff*, 344 U.S. at 116).

The same deference is required toward decisions of *congregational churches*, as the Supreme Court of Georgia said in *Gervin v. Reddick*, 246 Ga. 268 S.E.2d 657 (1980):

> *Where a church has adopted a congregational form of government, "the church itself,* by and through a majority of its members, *is the highest tribunal with jurisdiction to pass upon and determine all differences between its members* upon questions of doctrine, discipline, ecclesiastical law, rule, custom, *church government*, faith and practice of the church."

246 Ga. 56, 268 S.E.2d at 259 (quoting *Stewart v. Jarriel*, 206 Ga. 855, 59 S.E.2d 368, 369-70 (1950)). Accordingly, in a church dispute in a congregational church (such as

the church in *Gervin* and the Church in this case), the court has jurisdiction *only* to determine which litigants represent the majority. Having decided only that preliminary issue, the court must turn the church property over to the majority, without any conditions, and dismiss the case.

> The superior court clearly had the authority to take jurisdiction of this church dispute. But once it resolved the property issues by determining which group represented the majority of the congregation, any further attempt to regulate the internal affairs and doctrines of the church by appointment of a special master was error. The treasured principle of separation of church and state demands this conclusion.

Gervin, 246 Ga. 56, 268 S.E.2d at 259. Here, the Superior Court correctly ruled that the list of 23 was the official membership roll. Obviously, Respondents are a minority of the 23, and are not entitled to control the Church's funds.

Likewise, the Eleventh Circuit, in a case arising in Georgia, reiterated that regardless of a church's governmental structure, civil courts *must* defer to its highest internal decisions:

> The distinction drawn . . . between the types of congregational and hierarchical church polities [is] relevant only to determining the ecclesiastical body to which the civil court must defer in determining the rights to use of the property.

Crowder v. Southern Baptist Convention, 828 F.2d 718, 726 n.20 (11th Cir. 1987). Civil courts are required to defer to the decisions of the governing body in a congregational or independent church, which may be either the congregation itself or a board selected pursuant to governing documents

adopted by the congregation. (In this case, both the Board and the congregation approved all of the decisions challenged by the minority.)

A. The First Amendment Precludes Redetermination of Majority Decisions in Congregational Churches.

In this case, the constitutional restrictions mean that the civil courts of Georgia could not redetermine the decisions reached by the Church through majority votes of its governing Board and its congregation. Civil courts are *prohibited* from "reject[ing] . . . the decisions of the highest ecclesiastical tribunals" of a church on disputed issues and are prohibited from "substitut[ing] [the courts'] own inquiry into church polity." *Serbian*, 426 U.S. at 708.

> It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be *binding* in all cases of ecclesiastical cognizance, *subject only to such appeals as the organism itself provides for.*

Id. at 711 (quoting *Watson v. Jones*, 80 U.S. 679, 728-29 (1872)) (some emphasis omitted). *Accord, Presbyterian Church*, 393 U.S. at 446 ("But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.") (quoting *Watson*, 80 U.S. at 729); *Kedroff*, 344 U.S. at 115.

Judicial redeterminations such as the Georgia courts' in this case are prohibited because they "*require* a civil

court to pass on questions of religious doctrine, and to usurp the function" of the governing authorities of the church. *Jones v. Wolf*, 443 U.S. at 609. "[T]he First Amendment *requires* that the Georgia courts give deference" to the Church's own determinations. *Id.*[6] Whether that required deference in this case is to the Board of Trustees' decisions or to the congregation's decisions, the result is the same: *both the Board and the congregation, by supermajority vote, had clearly approved the actions that the Superior Court submitted to the jury for redetermination.*[7]

The Georgia courts' redetermination of Church decisions in this case substituted the will of a small minority of church attenders (including several who had ceased attending) for the will of supermajorities of the Board and the congregation. As in *Kedroff*, the Georgia courts "thus intrudes for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment." 344 U.S. at 119.

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[6]In Jones, "[i]ssues of church doctrine and polity pervade[d] the provisions of" the governing church documents regarding membership. 443 U.S. at 609 n.7. The same is true here.

[7]This Church is governed by its Board of Trustees, and like many nonprofit corporations is not formally a membership organization, under its Articles of Incorporation. The Church did have people whom it called members, like many nonmembership charities, and the members had advisory votes on important matters. It does not matter whether the Church was Board-governed or member-governed, however, because both approved everything.

Accord, Crowder v. Southern Baptist Convention, 828 F.2d 718 (action challenging parliamentary ruling by chairman at denominational convention dismissed under First Amendment).

B. The First Amendment Precludes Civil Court Reinterpretation, Contrary to the Majority's Interpretation, of the Governing Documents of the Church.

The Georgia courts' redetermination of the Church's decisions required reinterpretation of the Church's Articles of Incorporation, Bylaws, and Minutes on numerous issues, including: (i) the relative authority of the Board of Trustees, the Board of Directors, the Pastor, and the congregation to make the disputed decisions; (ii) the qualifications for continuing congregational and Board membership; (iii) whether several of the minority continued to be members after leaving the Church; (iv) whether Respondent Ray Stevens and other one-time Board members continued to be Board members after leaving the Church; and (v) what uses of the remaining proceeds of the property sale would be consistent with the Church's purposes. All those issues had already been determined by the clear majority, which the Georgia courts overrode.

The First Amendment forbids exactly the kind of interpretation of Church polity that the Georgia courts conducted here.

> *[N]o* . . . inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations . . . is consistent with *the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical poli-*

> *ty on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.* For civil courts to analyze whether the ecclesiastical actions of a church judicatory are . . . "arbitrary" must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that *religious controversies are not the proper subject of civil court inquiry*, and that a *civil court must accept the ecclesiastical decisions of church tribunals as it finds them.*

Serbian, 426 U.S. at 713. *See id.* at 7217-22 ("the Supreme Court of Illinois substituted its interpretation of the [church] constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation. This the First and Fourteenth Amendments *forbid.*"). Where the case involves a congregational or independent church, the same deference is required to the majority's decisions. *See Gervin*, 246 Ga. 56, 268 S.E.2d at 259.

C. The First Amendment Precludes Civil Courts from Overriding the Church's Decisions About Continuing a Religious Ministry and Disposing of Some Church Property, Contrary to the Church's Supermajority Vote by Its Board and Congregation.

The Church board and congregation determined by 80% vote that its funds would be used for (i) a continued religious ministry, (ii) pastoral retirement benefits, (iii) mortgage payoffs, and (iv) a real estate commission. The trial court unconstitutionally overrode the supermajority vote to contin-

ue a religious ministry of sermon broadcasts, tapes, and newsletters, and diverted half the Church assets from that approved ministry. The trial court unconstitutionally overrode the supermajority vote to pay the pastor retirement benefits by submitting the issue to the jury, although the jury upheld the benefits. The trial court unconstitutionally overrode the supermajority vote to pay both church mortgages, including the second mortgage to the pastor approved years earlier, by submitting the issue to the jury, although the jury upheld most of the benefits. The trial court unconstitutionally overrode the supermajority vote to pay the full standard real estate commission, including a portion disclosed and paid to the pastor for his extensive uncompensated work in selling the property.

This Court's cases make it clear that the trial court's overriding of these Church decisions violated the First Amendment. *E.g.*, *Watson*, 80 U.S. at 729 ("those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals."); *id.* at 730 ("It belongs not to the civil power to enter into or review the proceedings of an ecclesiastical court."); *Kedroff*, 344 U.S. at 120-21 ("There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. . . . [T]he church rule controls. This under our Constitution necessarily follows in order that

there may be free exercise of religion."); *Serbian*, 426 U.S. at 713 ("no . . . inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations is consistent with the constitutional mandate").

D. The First Amendment Precludes Civil Courts from Enjoining the Church's Governing Board from Even Meeting Contrary to the Unanimous Selection of that Board.

The highest authority in the Church, the Board of Trustees, gave proper notice of a meeting to take various actions that would have resolved all of the minority's objections to the Church's various decisions, though the Board did not agree that any of the objections were valid. The trial court arbitrarily and unconstitutionally prohibited the Church Board from meeting.

Because the trial court was obligated by the First Amendment to abide by the decisions of the governing board, it necessarily could not prohibit the board from meeting.

E. The First Amendment Precludes Civil Courts from Prohibiting a Church from Paying To Defend Itself Against a Receivership Action by a Small Minority.

The Church was entitled to pay for its legal defense from Church assets. The trial court's seizure of the Church's assets, in part to prevent the Church from paying for its own defense, violated the First Amendment.

F. The Minority's Recourse Is Through the Church, Not the Civil Courts.

This First Amendment protection against judicial interference in church disputes does not leave a disgruntled member

without recourse. As this Court has recognized, disgruntled members can seek redress within the church, as they agreed to do when they voluntarily joined the church:

> It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be *binding* in all cases of ecclesiastical cognizance, *subject only to such appeals as the organism itself provides for.*

Serbian, 426 U.S. at 711 (quoting *Watson v. Jones*, 80 U.S. at 728-29) (some emphasis omitted). *Accord, Kedroff*, 344 U.S. at 115.

II. THE THIRD-CLASS CATEGORY OF CHURCHES CREATED BY THE GEORGIA COURT OF APPEALS CONFLICTS WITH THIS COURT'S FIRST AMENDMENT DECISIONS AND LEAVES EVERY NONDENOMINATIONAL CHURCH WITHOUT THE PROTECTION OF THE FIRST AMENDMENT'S LIMITATIONS ON CIVIL COURTS' JURISDICTION.

A. Incorporation Under Nonprofit Corporation Codes Has No Effect on Whether a Church Is Hierarchical or Congregational and Does Not Create a Third-Class Church.

The Georgia Court of Appeals correctly noted that this Court categorizes churches as either hierarchical or congregational. 210 Ga. App. at 233, 435 S.E.2d 690 (Appendix I at A-5). Ignoring the reality that virtually all local churches, whether congregational or hierarchical, are incorporated as nonprofit corporations, the Georgia Court of Appeals wrongly assigned Conyers Community Church to a never-before-existing third category of "incorporated" church-

es. 210 Ga. App. at 233, 435 S.E.2d 690 (Appendix I at A-5, 6.) The Georgia Court of Appeals' novel creation of the third-class category is based on (i) an erroneous understanding of the existing "congregational" category and (ii) an erroneous assumption that the previous decisions of this Court did not involve incorporated churches.

1. All Independent Churches Are "Congregational" Churches.

Independent churches such as Petitioner Conyers Community Church are by definition congregational churches. The "congregational" category of churches discussed in this Court's cases is not confined to churches that are governed in every particular by majority vote of the church members. In the case law, "congregational" is merely a synonym for *local control*, as opposed to the outside control that exists for a local church in a hierarchical denomination. As this Court held in *Watson v. Jones*, 80 U.S. at 722, a congregational church is one that is "strictly independent of other ecclesiastical associations, and [one that] so far as church government is concerned, owes no fealty or obligation to any higher authority." In its independence, the congregational church may be governed by the congregation or by some other internal body:

> The second class of cases which we have described has reference to the case of a church of a strictly congregational or *independent* organization, *governed* solely within itself, *either by a majority* of its members *or by such other local organism as it may have instituted* for the purpose of ecclesiastical government. . . .

> . . . If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation *officers in whom are vested the powers of such control*, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation.

Watson v. Jones, 80 U.S. at 724. Thus, a church is congregational in the constitutional sense if it is *self-governing*, whether that internal government is by majority vote or by a board or by some other means.

2. Incorporation Has Never Been a Factor in First Amendment Cases.

The churches involved in this Court's decisions, whether congregational or hierarchical, generally were incorporated. In fact, the churches *must* have been incorporated or they could not have been litigants in most states. *E.g., Heath v. Butler*, 213 Ga. 411, 99 S.E.2d 131, 132 (1957) ("A religious society that is not incorporated can not sue or be sued as such.").

In this Court's decisions, the churches' incorporation or lack of incorporation was never a factor. In *Kedroff*, the local church was *incorporated* under New York law in 1925. 344 U.S. at 95. Even though the church was incorporated, the New York legislature's subsequent statute that transferred the administrative control of the church from the

Moscow headquarters to the North American headquarters violated the First Amendment's Free Exercise Clause. *Id.* at 107. Incorporation did not diminish the church's First Amendment rights.

Similarly, in *Jones v. Wolf*, the local church was *incorporated*. 443 U.S. at 601 (describing "the corporate charter of the Vineville church"). Nevertheless, this Court noted that the predecessor of Ga. Code § 14-5-43, which it described as a "provision dealing with the identity of a religious *corporation*," would govern if the church had been a congregational church. 443 U.S. at 608 n.6. If the act of incorporating rendered § 14-5-43 inapplicable, this Court would have said so, in considering Georgia law.

The other cases in this Court have applied the First Amendment's protections to churches without regard to the fact that the churches were incorporated. *E.g., Presbyterian Church*, 393 U.S. 440 (church described as "a religious corporation" in Georgia Supreme Court opinion being reviewed, *Eastern Heights Presbyterian Church*, 225 Ga. 259, 167 S.E.2d at 659); *Serbian*, 426 U.S. at 699, 702 (diocese and monastery respondents were Illinois corporations); *Watson v. Jones*, 80 U.S. at 683 (local church incorporated in 1854). *See also Crowder*, 828 F.2d at 718 n.1 (Southern Baptist Convention incorporated in 1845).

Georgia's judicial anomaly sets aside clear First Amendment protections and should be reversed.

B. The Georgia Court of Appeals' Decision Rips All First Amendment Protection Away from Incorporated Nondenominational Churches.

If the minority (and the Georgia Court of Appeals) were correct in defining congregational churches to exclude all independent incorporated churches, only denominational churches would be protected by the First Amendment's limitations on the jurisdiction of civil courts, described in the above cases. Independent (i.e., nondenominational) churches, once incorporated, would thereby waive their First Amendment protections against redetermination of their internal decisions by secular courts and juries. No other case from any jurisdiction reaches that result. There is simply no support in law or logic for the Georgia Court of Appeals' unique decision.

C. Petitioner Is a Congregational Church Controlled by Its Members (Through Its Board of Trustees) and Is Not Subject to "Neutral Principles" Review.

It is undisputed that the Church in this case is not connected in any way to any outside ecclesiastical organization. Thus, it is purely congregational, and is not hierarchical.[8] The Georgia Court of Appeals' reliance on "neutral principles of law" to justify the trial court's intrusion into the government of this congregational church was wrong, because "neutral principles" are relevant only in cases involving hierarchical churches (and then only to

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[8]In this case, the Articles of Incorporation require the conclusion that the ecclesiastical body to which the civil court must defer is the Board of Trustees, although both that Board and the congregation voted by supermajorities to take the actions challenged by the minority.

determine ownership between the local church and the denomination, *not* to redetermine board membership, congregation membership, or board and congregation votes).

The Eleventh Circuit, in a case arising in Georgia, reiterated that regardless of a church's governmental structure, civil courts *must* defer to its internal decisions:

> The distinction drawn . . . between the types of congregational and hierarchical church polities [is] relevant only to determining the ecclesiastical body to which the civil court must defer in determining the rights to use of the property.

Crowder, 828 F.2d at 726 n.20.

D. Majority Decision Ends the Inquiry for Congregational Churches.

In a congregational church, decisions about the disposition of church property by the majority of the members *must* be upheld by the civil courts under prior Georgia law:

> After the court made its finding that this church had a congregational form of government, and that the appellees represented a majority of the members of the congregation, the church property, and its government, *should have vested in the appellees with no further conditions or limitations* on the part of the court.

Gervin, 246 Ga. 56, 268 S.E.2d at 659.

Here, Petitioners represent the supermajority of the congregation and the supermajority of the Church Board, without any dispute. Under even Georgia courts' prior precedent, the Georgia courts wrongly "attempt[ed] to regulate the internal affairs . . . of the church," *Gervin*, 246 Ga. 56, 268 S.E.2d at 659.

III. IN THIS CASE OF FIRST IMPRESSION, THE GEORGIA COURT OF APPEALS VIOLATED THE FIRST AMENDMENT IN DECIDING THAT THE TRIAL COURT COULD FORCE THIS SOLVENT CONGREGATIONAL CHURCH INTO RECEIVERSHIP AT THE URGING OF A DISSIDENT MINORITY.

The Georgia courts' imposition of a receivership on Conyers Community Church was a direct violation of the Establishment Clause:

> [T]he extreme remedy of receivership . . . constitute[s] a forbidden official entanglement in church affairs. . . . *"For the State, through its receiver, to run a church* -- even for the time it takes to prepare for and conduct a trial -- *is an `establishment of religion' in its purest and most obvious form."*

Oaks, *Trust Doctrines in Church Controversies*, 1981 B.Y.U.L. Rev. 805, 889 (quoting Prof. Laurence H. Tribe). This was true even under Georgia law until this case. *See Gervin*, 246 Ga. 56, 268 S.E.2d at 659.

Here, the Georgia courts froze the Church's assets and placed them under the control of a receiver (where they still remain), prohibited the disposition of the Church's assets that the highest bodies in the Church had overwhelmingly approved, prohibited the Church's governing board from meeting to conduct business, and prohibited the Church from using its own assets to pay to defend itself in this suit. The Georgia courts' actions were unconstitutional.

IV. THE GEORGIA COURT OF APPEALS' DECISION THAT A MINORITY OF THIS CONGREGATIONAL CHURCH HAD STANDING TO SUE THE CHURCH CONFLICTS WITH THIS COURT'S DECISIONS

REJECTING THE "DEPARTURE FROM DOCTRINE" THEORY.

The Georgia Court of Appeals held that even if the Church is a congregational church, "the plaintiffs had standing [to] alleg[e] a diversion of the church property from the purpose for which the church and its assets had been devoted."[9] 210 Ga. App. at 235, 435 S.E.2d 690 (Appendix I at A-7).

In reaching this conclusion, the Georgia Court of Appeals *relied on cases overruled by this Court. Dowdell v. Cherry*, 209 Ga. 849, 76 S.E.2d 499 (1953), *Tucker v. Paulk*, 148 Ga. 228, 96 S.E. 339 (1918), and Ga. Code § 14-5-49 (as applied to churches) all were overruled by this Court in *Presbyterian Church*, 393 U.S. 440. *Accord, Jones v. Wolf*, 443 U.S. at 600 ("the implied trust theory would have to be abandoned in its entirety"); *Kedroff*, 344 U.S. at 117-18 (reversing state court's attempt to imply a trust for dissidents in the church).

In order to determine whether there has been any departure from any of a church's purposes, the civil court must necessarily decide (i) "whether the challenged actions of the . . . church depart substantially from prior doctrine" and (ii) "whether the issue on which the . . . church has departed holds a place of such importance in the traditional theolo-

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[9]Only seven of the ten respondents are among the 23 official members -- less than one-third. Even if all ten respondents are considered members so that the 23 official members becomes 26, the respondents constitute, at most, 38.5% of the congregation--a small minority at best.

gy as to require that the trust be terminated." *Presbyterian Church*, 393 U.S. at 450. This Court continued its condemnation of the theory:

> Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion -- the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

393 U.S. at 450.

Here, the trial court instructed the jury to determine whether the majority's decisions regarding the disposition of the Church's property departed from the trust to which the property was committed under the Church's governing documents, which described the Church's purposes in purely religious terms. That inquiry is forbidden by the First Amendment, and the Georgia Court of Appeals should have reversed the jury verdict as well as the lower court's intrusion.

V. THE GEORGIA COURT OF APPEALS' DECISION ALLOWING THE CIVIL COURT TO REDETERMINE THE MAKEUP OF THIS CONGREGATIONAL CHURCH'S BOARD OF TRUSTEES AND CONGREGATION CONFLICTS WITH THIS COURT'S DECISIONS.

A. The Trial Court Jury Did Redetermine the Makeup of the Church's Board of Trustees and Congregation.

The premise of the minority's last-minute fraud theory in this case was that the makeup of the Board and the congregation were "manipulated" by Rev. Crocker, so that the Board's and congregation's decisions should be set aside because

eligible members of both did not participate in the relevant votes.

Only by redetermining the makeup of the 3-member Board and 23-member congregation could 3-0 and 12-3 votes be challenged. For the jury to have set aside any Church decisions, even the few decisions out of the many challenged by the minority, it must have redetermined the composition of the Board and/or the congregation.

B. Civil Courts Are Prohibited from Making Such Redeterminations.

It is settled law that the civil courts are without jurisdiction to determine who are the proper *trustees* of a church. *Serbian*, 426 U.S. at 717 ("questions of . . . the composition of the church hierarchy are at the core of ecclesiastical concern" and cannot be addressed by civil courts); *Jones v. Wolf*, 443 U.S. at 603 ("religious societies can specify . . . what religious body will determine the ownership in the event of schism"); *Watson*, 80 U.S. at 734 (reversing state court of appeals because it "substitut[ed] its own judgment for that of the ecclesiastical court, decid[ing] that ruling elders, declared to be such by that tribunal, are not such, and must be recognized by the congregation, although four-fifths of its members believe in the judgment of the [tribunal]"). This was even true under prior Georgia law. *Smith v. Kelly*, 208 Ga. 233, 65 S.E.2d 795, 796-97 (1951) ("Jurisdiction to determine who are the duly constituted trustees of the church organization rests with the ecclesiastical forum of the organization, and not with a court of equity.").

Nor can civil courts determine who are the *members* of a church. As this Court held in *Watson*,

> We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church.

Watson, 80 U.S. at 730 (citation omitted). *See also Bouldin v. Alexander*, 82 U.S. 131 (1872) ("we have no power to revise or question ordinary acts of . . . excision from membership").

Thus, the Georgia courts' redetermination of board and congregation membership violated the First Amendment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of Georgia.

Dated March 3, 1994.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX I

CROCKER et al. v. STEVENS et al.;
BIRD & ASSOCIATES v. STEVENS et al.

A93A0740, A93A0741, A93A0742

COURT OF APPEALS OF GEORGIA

210 Ga. App. 231; 435 S.E.2d 690 (1993)

August 26, 1993, Decided

OPINION: [*231] BLACKBURN, Judge.

These companion appeals arose from a petition to dissolve the Conyers Community Church, which was a nonprofit corporation, and to dispose of the church's assets. The church was organized in 1976, and its membership, at its greatest, numbered 70 to 80. By late 1989, the membership had dwindled to approximately 23, and the church's board of trustees (which included Kenneth Crocker (the church's pastor), his son-in-law, and a third individual) decided to sell the church realty to a commercial buyer for $725,000.

From those proceeds, the church satisfied a first mortgage on the property of $164,070, a second mortgage of $156,616 owed to the pastor, and the closing costs of $75,418 ($29,000 of which was paid to the pastor, who also was a real estate broker and served as co-broker in the sale.) The last church meeting took place on February 18, 1990, at which time the majority of members present approved as retirement benefits for the pastor: a lump sum gift of $100,000, and convey-

ance of the parsonage (after payment of the $34,038 encumbrance on it). According to Crocker and the church, church operating costs from the closing date until the last congregation, totalling $22,558, were also paid from the proceeds. The remainder of the sale proceeds was to be used to carry on the church's purpose through radio, tape, newsletter, and missionary ministry, with the pastor having control of those funds.

Subsequently, some of the church members commenced this action against Crocker and the church itself, seeking dissolution of the corporation, appointment of a receiver, an injunction against the defendants' disposing of the corporate assets, and proper disposition of those assets. The trial court appointed a receiver over some of the assets in question, and enjoined Crocker from disposing of the assets in his control. Crocker eventually asserted a counterclaim against one of the plaintiffs, Ray Stevens, for comparing him to Jim Bakker in a newspaper article.

Crocker and the church corporation moved for summary judgment, which was denied by the trial court, and then sought an interlocutory appeal with the Georgia Supreme Court. The Supreme Court, however, denied the application. The matter proceeded to trial, and resulted in a jury verdict, wherein the plaintiffs were [*232] awarded $56,616.37 second mortgage held by Crocker; the plaintiffs were awarded the $29,000 real estate commission claimed by Crocker; Crocker was awarded the parsonage and the $100,000 retirement gift; the plaintiffs were awarded the remaining church funds totalling $207,801.63, the church's personal property, and

all the interest that had accrued on the church's funds while in the control of the receiver; and the plaintiffs were awarded $30,000 attorney fees and expenses of litigation against Crocker. The trial court directed a verdict against Crocker on his counterclaim for defamation, and denied the defendants' claim for attorney fees to be paid from the church funds.

Subsequent to the trial, the court denied the defendants' motion for judgment notwithstanding the verdict and motion for new trial. It also dismissed Crocker's notice of appeal from the directed verdict in his counterclaim, because he had not filed a transcript timely. In Case No. A93A0740, Crocker appeals the trial court's direction of a verdict on the counterclaim in favor of Stevens. Case No. A93A0741 concerns the judgement entered on the jury's verdict and the dismissal of Crocker's notice of appeal on the counterclaim. Case No. A93A0742 involves the denial of attorney fees and litiga-tion expenses incurred by the defendants.

1. Initially, we must address the issue of this court's jurisdiction to consider these appeals. OCGA § 14-3-219 provides that superior courts have jurisdiction over the dissolution of corporations and the liquidation of the corporate assets and affairs, and the trial court specifically instructed the jury on this Code section. In *Claire v. Rue de Paris*, 239 Ga. 191, 193 (236 SE2d 272) (1977), wherein a shareholder filed a petition for dissolution of a corporation and an injunction to prevent the corporate officers from disposing of corporate assets, the Supreme Court quoted the above Code section and noted that the plaintiff's complaint

under that section "seeks equitable relief." In *Gervin v. Reddick*, 246 Ga. 56 (268 SE2d 657) (1980), involving an action by a majority of church members against the Board of Deacons and the Church's pastor to enjoin depletion of church assets, the Supreme Court also held that courts of equity have jurisdiction over church disputes where property rights are involved. Further, a petition for dissolution of a corporation, injunction, and disposition of corporate assets may be likened to a complaint seeking dissolution of a partnership, injunction, and accounting, which has been held to be an equity action. *Williams v. Tritt*, 262 Ga. 173 (415 SE2d 285) (1992); *Bettis v. Leavitt*, 236 Ga. 213, 217 (233 SE2d 88) (1976).

In view of the above authorities, along with the fact that the Supreme Court did not transfer the previously-filed interlocutory appeal to the Court of Appeals, this court transferred these appeals to the Supreme Court ordered that these cases be returned to this [*233] court, without specifying the basis for doing so.

2. Crocker and the church, however, contend that any civil court's exercise of jurisdiction over this church dispute is prohibited by the First Amendment to the United States Constitution. We disagree.

"[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by

opening their doors to disputes involving church property." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (89 SC 601, 21 LE2d 658) (1968).

With regard to cases involving disputes over church property, the Georgia Supreme Court has previously distinguished between two types of church government, i.e., congregational and hierarchical. A congregational church is usually strictly independent of other ecclesiastical associations, while a hierarchical church is associated with other churches that share similar faith and doctrine and have a common ecclesiastical head. *Crumbley v. Solomon*, 243 Ga. 343 (254 SE2d 330) (1979). "If the church government is congregational, then a majority of its members control its decisions and local church property. If hierarchical, then we use 'neutral principles of law' to determine whether the local church or parent church has the right to control local property. Those 'neutral principles' are state statutes, corporate charters, relevant deeds, and the organizational constitutions of the denomination. [Cit.]" Id. See also, *Jones v. Wolf*, 244 Ga. 388 (260 SE2d 84) (1979).

The instant case represents a hybrid of the above two forms of church government. It is clear that the church government cannot be categorized as congregational; although it had some elements of that form of governance, the church was organized as a nonprofit corporation, with articles of incorporation and by-laws. However, the church also was unconnected to any other churches with a common ruling convocation, and thus was not hierarchical. Nevertheless, as with

hierarchical churches, the property dispute here was capable of resolution by reference to neutral principles of law, i.e., the applicable statutory provisions of the Georgia Nonprofit Corporation Code, without infringing upon any First Amendment values. In this regard, the trial court adhered to neutral principles by referring the jury to the church's articles of incorporation and by-laws and instructing the jury on the state corporate law, part of which provides that "[i]f religious doctrine governing the affairs of a corporation is inconsistent with the provisions of this chapter on the same subject, the religious doctrine [*234] shall control to the extent required by the Constitution of the United States or the Constitution of this state or both." OCGA § 14-3-180. Contrary to the defendants' contention, it appears that the trial court ensured that First Amendment values were not jeopardized.

3. Crocker and the church contend that the plaintiffs lacked standing to bring this action because they did not represent a majority of the membership. In support of that contention, they rely upon OCGA § 14-5-43, which provides in part that "[t]he majority of those who adhere to its organization and doctrines represent a church," and *Heath v. Butler*, 213 Ga. 411, 412 (99 SE2d 131) (1957), in which the Supreme Court cited the predecessor of that statutory provision and held that "[a] minority of church membership can not act for the church."

However, OCGA § 14-5-43 "properly is to be construed as being applicable only to churches having a congregational form of government." *Jones v. Wolf*, supra at 389. Inas-

much [*235] as the church government in this case cannot be categorized as congregational, as discussed above, OCGA § 14-5-43 and *Heath v. Butler*, supra, are inapposite.

"Courts are reluctant to interpose in questions affecting the management of the temporalities of a church; but, when property is devoted to a specific doctrine or purpose, the courts will prevent it from being diverted from the trust." OCGA § 14-5-45; *Dowdell V. Cherry*, 209 Ga. 849 (76 SE2d 499) (1953). Even where a church has a congregational form of governance, "[i]f the majority of the church depart from its organization and doctrines, they do not represent the church, and such majority can not divest the church property from the trust to which it has been devoted." *Tucker v. Paulk* 148 Ga. 228, 228-29 (96 SE 339) (1918). Accordingly, under the circumstances presented by the instant case, particularly where the resolution of the property dispute strictly followed neutral principles of law, the plaintiffs had standing in this action alleging a diversion of the church property from the purpose for which the church and its assets had been devoted.

4. Crocker and the church also argue that the First Amendment precludes the involuntary receivership imposed on the church by the superior court. However, they neither cite authority for that proposition, nor explain how such an action violates the First Amendment.

Under OCGA § 14-3-219, the superior court has full power to liquidate the assets and affairs of a nonprofit corporation when it is established that the acts of the directors or those in control of the corporation are illegal or fraudu-

lent, the assets are being misapplied or wasted, or where the corporation is unable to carry out its purposes, OCGA § 14-3-220 authorizes the superior court to issue injunctions or appoint a receiver as needed to preserve the corporate assets. Inasmuch as the church chose to incorporate under the Georgia Nonprofit Corporation Code, and appointment of a receiver is authorized under those codified neutral principles of law regarding liquidation of nonprofit corporations, we reject the contention that the First Amendment prohibited the involuntary receivership in this case.

5. Crocker and the church enumerate multiple errors in the trial court's instructions to the jury. Most of the jury charges about which they complain pertain to instructions patterned after portion of the Georgia Nonprofit Corporation Code. We find no error with regard to any of the jury charges.

The trial court instructed the jury about an implied trust resulting where one person obtains title to property by fraud, or where form the nature of the transaction it is manifest that it was the parties' intention that the person taking legal title should have no beneficial interest. Crocker and the church contend that the doctrine of implied trust may not be applied in church disputes under *Presbyterian Church v. Eastern Heights Presbyterian Church*, 225 Ga. 259 (167 SE2d 658) (1969).

In *Presbyterian Church*, the Supreme Court prohibited implication of a trust in a dispute over church property between a local church and the general church with which it was connected, where that implied trust was conditioned on

the general church adhering to its tenets of faith and practice at the time of the local church's affiliation with it. Allowing such a condition would have resulted in the court determining ecclesiastical questions, contrary to the First Amendment to the United States Constitution. However, the Supreme Court specifically did not rule out creation of a trust on church property by other means, i.e., "by the deeds on the property, implied under the statutes of this State . . ., or required by the constitution of the general church." id. at 260. The instant case does not involve the type of implied trust prohibited in *Presbyterian Church*.

Moreover, as pointed out by the plaintiffs, the jury charge on implied trust pertained to the allegations of Crocker having obtained the church property though his fraud and abuse of a confidential relationship, without references to any ecclesiastical issues. The prohibition regarding implied trusts contained in *Presbyterian Church* thus is inappropriate in the instant case.

Crocker and the church also contend that the trial court erred in refusing to instruct the jury that when a nonprofit corporation's by laws are inconsistent with the articles of incorporation, the articles govern. However, the trial court adequately covered that principle of law by charging that "each corporation also shall have the power to make and alter by-laws not inconsistent with its articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation," as provided in OCGA § 14-3-21 [*236] (b)(2). A jury charge need not be given in the exact language requested. *Swint v. Smith*,

204 Ga. App. 54 (418 SE2d 375) (1992).

Crocker and the church next contend that the trial court should have instructed the jury that it could not redetermine the membership of the board of trustees, because such issues were reserved to the church and not a secular authority. "Jurisdiction to determine who are the duly constituted trustees of the church organization rests with the ecclesiastical forum of the organization, and not with a court of equity. [Cit.]" *Smith v. Kelly*, 208 Ga. 233 (65 SE2d 795) (1951). However, although he jury was presented with the task of deciding whether Crocker had fraudulently manipulated the board of trustees, it was not necessary for the jury to redetermine the board's membership and there was no showing that the jury made such a determination.

Crocker and the church assert that the trial court erred in refusing to give their requested charge regarding membership of the church corporation and voting rights of members, based on OCGA §§ 14-3-80 and 14-3-82, thereby conferring upon the jury an unfettered discretion to determine the membership in the corporation. The record, however, reveals that the trial court did instruct the jury on those statutory principles contained in OCGA § 14-3-80 et seq. As noted above, it also was unnecessary for the trial court to use the exact language requested in making the jury charge. *Swint v. Smith*, supra.

Citing a general treatise and one Pennsylvania case as authority, Crocker and the church argue that the trial court should have instructed the jury that objections not made at the time a vote is taken in a membership corporation, as to

the membership entitled to vote or to the matters being voted upon, are waived. OCGA § 14-3-81 provides that attendance of a member at a meeting, either in person or by proxy, shall constitute a waiver of notice and waiver of any objections to the place and time of the meeting and the manner in which it has been called, and the trial court so instructed to the jury. However, nothing in the Georgia Nonprofit Corporation Code provides for a waiver of objections to the matters voted upon. Moreover, such a waiver would be inapplicable where the gravamen of the plaintiffs' complaint against Crocker is that the membership was not fully informed of all the circumstances behind the sale and disposition of the church property when it "approved" the proposed disposition.

6. The verdict form submitted to the jury first dealt with specific items to be awarded, and then authorized the jury to make a determination of the disposition of the balance of the proceeds form the sale of the church. After it began its deliberations, the jury inquired with the trial court whether it could simply indicate a general award of the remainder of those funds, rather than specify a dollar amount of that [*237] balance. Counsel for the plaintiffs and the defendants consented to allowing the jury to substitute for a dollar amount the words "the remainder," and having the trial court determine the amount of the remainder if the parties could not agree upon such.

The trial court found that the remainder of the sale proceeds consisted of $207,000, along with the tangible personal property of the church and all interest accrued on the funds in the hands of the receiver. Crocker and the church

now contend that the trial court failed to deduct church expenses that were incurred between the closing date of the sale and the last congregational meeting, and that the trial court erred in not allowing them to present additional evidence regarding such expenses.

With regard to the latter contention, the decision to reopen the evidence in a case is within the sound discretion of the trial court, and will not be disturbed absent a showing of an abuse of that discretion. *Williams v. State*, 205 Ga. App. 445 (2) (422 SE2d 309) (1992). In the instant case, where the parties agreed, after the evidence was closed, to having the jury award "the remainder" of the sale proceeds and the trial court resolve any dispute over the actual dollar amount, we find no abuse of discretion in the trial court's refusal to reopen the evidence.

With regard to the alleged miscalculation by the trial court of the remainder of the sale proceeds, the amount found by the trial court was within the range of the evidence presented during the trial. Where a verdict is within the range of the evidence adduced on the issue, and the award is not so excessive as to indicate bias or prejudice on the part of the factfinder, this court will not disturb the verdict. *Moultrie Farm Center v. Sparkman*, 171 Ga. App. 736 (320 SE2d 863) (1984).

7. The trial court also awarded the plaintiffs all of the interest that had accrued on the funds held by the receiver, as part of the remainder of the church assets. Throughout the litigation, Crocker remained in control of the parsonage, the $100,000 gift, and the full second mortgage amount.

The plaintiffs were ultimately determined to be entitled to most of the funds held by the receiver throughout litigation, but Crocker was awarded a portion of those funds.

Crocker contends that the trial court erred in awarding the plaintiffs all of the interest accruing on the funds held by the receiver, and we agree. Interest earned on court registry account usually is allocated proportionately to those who are ultimately determined to be owners of the principal. *Odyssey Stevedoring Corp. v. "Celtic Venture"*, 817 F2d 709, 711 (11th Cir. 1987). Similarly, the interest earned on funds held by a receiver should be allocated proportionately to the owners of the principal. Accordingly, Crocker was entitled to recover his proportionate share of the interest earned on the funds [*238] held by the receiver.

8. The plaintiffs asserted a claim for attorney fees under OCGA § 13-6-11, and the specific bases for that claim consisted of stubborn litigiousness and bad faith (in the form of fraud) on the part of the defendants. Because the plaintiffs recovered less on their primary claim than they sought, Crocker contends that the plaintiff's award for attorney fees was unauthorized We disagree.

Great disparity between the damages sought and those actually awarded in a verdict may defeat an award of attorney fees based on stubborn litigiousness under OCGA § 13-6-11, but not an award that is based on bad faith. *Ga.-Carolina Brick & Tile Co. v. Brown*, 153 Ga. App. 747 (266 SE2d 531) (1980). Where there is some evidence supporting a finding of bad faith, an award of attorney fees on that basis must be affirmed. *Harrell v. Gomez*, 174 Ga. App. 8 (6) (329 SE2d

302) (1985). In the instant case, the evidence showing Crocker's lack of disclosure of information regarding his personal benefit from the sale of the church, and his structuring of the church's board of directors, supplied that evidence. Further, contrary to Crocker's suggestion, the award of attorney fees is not apportioned to only those attorney fees attributable to the claims on which the plaintiffs prevailed. "In our view, a party acting in bad faith should pay the full price for losing. [Cit.]" *McDonald v. Winn*, 194 Ga. App. 459, 461 (390 SE2d 890) (1990).

9. The defendants contend that the trial court erred in refusing to award payment of their attorney fees and litigation expenses from the monies awarded to the plaintiffs.

OCGA § 14-3-220 (d) provides that in corporate liquidations, the superior court "shall have power to allow, from time to time, as expenses of the liquidation, compensation to the receiver or receivers and to attorneys in the proceedings and to direct the payment thereof out of the assets of the corporation or the proceeds of any sale or disposition of such assets." Under this Code section, it was within the discretion of the trial court to award attorney fees and litigation expenses incurred by the corporation in its defense of the liquidation proceeding brought by the plaintiffs. Considering the amount of the compensation awarded by the jury to Crocker and the degree to which payment of the church's expenses of litigation from the remainder would frustrate the charitable and religious purposes for which the church funds were intended under the corporate charter, the trial court did not abuse its discretion in refusing to award

attorney fees and expenses of litigation incurred by the corporation.

However, with regard to Crocker's attorney fees and litigation expenses associated with the liquidation proceeding, we reach a different conclusion. OCGA § 14-2-852 (applicable to nonprofit corporations pursuant to OCGA § 14-3-110) provides that "[u]nless limited [*239] by its articles of incorporation, to the extent that a director has been successful, on the merits or otherwise, in the defense of any proceeding to which he was a party, or in defense of any claim, issue, or matter therein, because he is or was a director of the corporation, the corporation shall indemnify the director against reasonable expenses incurred by him in connection therewith." This Code section endorses the approach towards indemnification expressed in *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A2d 138 (Del. 1974), i.e., a defendant is entitled to partial mandatory indemnification if he succeeds on some but not all claims or charges against him.

The plaintiffs argue that Crocker was not entitled to mandatory indemnification under OCGA § 14-2-852 because their action against him was unrelated to his position as director of the church corporation. However, in their amended complaint, the plaintiffs specifically alleged that Crocker breached his fiduciary duty as director of the church corporation, and that allegation actually constituted the gist of their claim against Crocker. We also reject the plaintiffs' contention that inasmuch as OCGA § 14-2-852 provides for indemnification out of the corporation's funds, such relief was unavailable because the verdict already disposed of all

of the corporation's assets. Under OCGA § 14-3-220 (c) (1), in a liquidation proceeding, the assets of a corporation or the proceeds resulting from a sale, conveyance, or other disposition must be applied to the liabilities and obligations of the corporation. In short, the corporation's liabilities, one of which would be mandatory indemnification to Crocker, would have priority in the distribution of the corporate assets.

10. After commencement of this action against Crocker and the church, one of the plaintiffs, Ray Stevens, was quoted in a newspaper as saying: "This is sort of like Jim Bakker on a smaller scale." Crocker subsequently file a counterclaim against Stevens alleging defamation. The trial court, however, directed a verdict in favor of Stevens on this counterclaim. Further, after Crocker filed a notice of appeal but failed to file a transcript timely, the trial court dismissed the notice of appeal.

The trial court directed the verdict on the counterclaim on June [*240] 4, 1992: after an extension of time to file, notice of appeal was filed on August 5, 1992. The entire transcript in the matter was ordered on July 2, 1992, although the portion of the trial transcript pertaining to Crocker's

counterclaim consisted of only 78 pages. At that time, the court reporter advised Crocker that the entire transcript could be prepared in about two months, but a cost deposit of $2500 was required. The court reporter immediately began working on the transcript, and within three weeks had completed 900 pages of the approximately 2000 page transcript.

One July 15, 1992, the court reporter called counsel for Crocker and the church to inquire about the $2500 deposit which still had not been paid, and she was informed of some uncertainty over whether an appeal would be filed. One July 16, 1992, Crocker filed a motion for extension of time for filing a transcript. One August 10, 1992, Crocker paid $1000 towards the cost of the transcript, but again expressed some uncertainty about proceeding with an appeal. Finally, on September 15, 1992, Crocker sent $1360.50 to the Clerk of Court for appeal costs, which was handed over to the court reporter to count towards the $2500 deposit, and work on the transcript resumed. Ultimately, the transcript was filed on December 8, 1992, three months late.

OCGA § 5-6-48 (c) provides, in part, that "the trial court may, after notice and opportunity for hearing, order the appeal be dismissed where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party." In *Baker v. Southern R. Co.*, 260 Ga. 115, 116 (390 SE2d 576) (1990), the Supreme Court reiterated those showings required under that Code section, and emphasized that "[to]he failure to apply for an extension does not automatically convert the delay into one which fits all of the conditions necessary to vest the trial court with the discretion to dismiss the appeal."

In the instant case, the notice of appeal was not dismissed because of the failure to apply an extension timely. The evidence showed that the reason for the delay in the preparation of the transcript was Crocker's failure to pay

the required $2500 deposit, in conjunction with his expressed uncertainty about proceeding with an appeal in the matter. Although the trial court dismissed the notice of appeal on November 30, 1992, the transcript was not filed until December 8, 1992, making the total length of the delay about three months.

"The trial court has a very broad discretion in deciding whether or not to dismiss for delay. [Cits.]" *Barmore v. Himebaugh*, 205 Ga. App. 381, 382 (422 SE2d 255) (1992); see also, *A. Roberts Corp. v. Roberts*, 207 Ga. App. 663 (428 SE2d 671) (1993). Under the circumstances presented in the instant case, we find no abuse of discretion in the trial court's dismissal of the notice of appeal from the directed verdict on the counterclaim, on the grounds that the delay was inexcusable, unreasonable, and cause by Crocker's failure to pay the required deposit for preparation of the transcript.

11. In view of our holding in division 10 above, Crocker's appeal on the merits of the trial court's direction of a verdict on the counterclaim is dismissed as moot.

Judgement affirmed in part, reversed in part in Case No. A93A0741 and in Appeal No. A93A0742. Case No. A93A0740 Dismissed. McMurray, P.J., and Johnson, J., concur.

APPENDIX II

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: DECEMBER 03, 1993

David J. Myers
BIRD & ASSOCIATES
1150 Monarch Plaza
3414 Peachtree Road, Northeast
Atlanta, GA 30326

Case No. S94C0025
KENNETH L. CROCKER ET AL. V. RAY STEVENS ET. AL.

COURT OF APPEALS CASE NO. A93A0740 A93A0741 A93A0742

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

S93A0846

SUPREME COURT OF GEORGIA

ATLANTA April 16, 1993

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Kenneth L. Crocker v. Ray Stevens et al.

From the Superior Court of Rockdale County.

It is ordered that this case be returned to the Court of Appeals.

SUPREME COURT OF
THE STATE OF GEORGIA
Clerk's Office, Atlanta
I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lynn M. Stinchromb, Deputy Clerk

Court of Appeals
of the State of Georgia

ATLANTA, March 10, 1993

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

A93A0740, A93A0741, A93A0742. CROCKER et al. v. STEVENS et al.

These appeals arise from a petition for dissolution of church as a nonprofit corporation, injunction, appointment of a receiver , and disposition of the corporate assets. Equitable relief was sought and obtained. In *Claire v. Rue de Paris*, 239 Ga. 191, 193 (236 SE2d 272) (1977), wherein a shareholder sought dissolution of a corporation and an injunction to prevent the officers and directors from disposing of corporate assets, the Supreme Court found that the action was one in equity. See also, *Gervin v. Reddick*, 246 Ga. 56 (268 SE2d 657) (1980), wherein the church property, in which injunctive relief was sought, was properly before a court of equity. Further, the action and relief sought in the instant action may be likened to a complaint seeking dissolution of a partnership, accounting, and injunction, which is an equity action. *Williams v. Tritt*, 262 Ga. 173 (3) (415 SE2d 285) (1992).

The Supreme Court has jurisdiction over all appeals in equity cases. Ga. Const. Art. 6, § 6, Para. III (2) (1983). Accordingly, these appeals are hereby transferred to the

Supreme Court.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Victoria McLaughlin
Clerk

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

	:	CIVIL ACTION
RAY AND PEGGY STEVENS,: DEXTRAL AND ROSALYN: AUSTIN, JOHN AND : BENETTA KIKER, : RAYMOND W. AND : GAIL WOMMACK, and : JERRY DODD, : Plaintiffs, :	:	FILE NO. 90-CV-1603
v.	:	
KENNETH L. CROCKER AND: CONYERS COMMUNITY : CHURCH, INC., : Defendants. :		

ORDER

The above styled case having come on for final trial before a jury having returned its Verdict, said Verdict having been published in open court, the Verdict is hereby approved and made the judgement of the court as follows:

1. The Defendants are entitled to $100,000.00 of the $156,616.37 second mortgage held by Kenneth L. Crocker.

2. The Plaintiffs are entitled to $56,616.37 of the $156,616.37 second mortgage held by Kenneth L. Crocker.

3. The Plaintiffs are entitled to the $29,000.00 real estate commission.

4. The Defendants are entitled to the parsonage located at 1795 Laurel Ridge Drive, Conyers, Rockdale County,

ty, Georgia 30207. [*2]

5. The Defendants are entitled to the $100,000.00 retirement/gift of love and affection.

6. The jury having received a verdict form that provided as follows:

"Balance of church funds and other property:

(a) We the jury find for the Plaintiffs against the Defendants in the amount of _____.

(b) We the jury find for the Defendants,"

the jury having inquired of the court if it would be permissible to fill in the blank with the phrase "the remainder" rather than to set a dollar amount, the court having discussed this issue with the attorneys for the parties, and the attorneys having agreed that the jury could award "the remainder" of the church funds and other property in lieu of establishing a dollar figure, and that the court would then set a dollar amount for "the remainder" based on the evidence at trial,

The Plaintiffs are entitled to the remainder of the church funds and other property, as follows:

(a) The Plaintiffs are entitled to the remaining church funds in the amount of $207,801.63. (See attached hereto and made a part of the Judgement an explanation of how this figure was determined;)

(b) The Plaintiffs are entitled to the church property, said property consisting of the computer, duplicating equipment, taping equipment, tapes, and organ; and [*3]

(c) The Plaintiffs are entitled to all interest accrued on the funds in the control of the receiver.

7. The Plaintiffs are entitled to attorney's fees and expenses of litigation against the Kenneth L. Crocker in the amount of $30,000.00.

8. The Defendants having sought payment of attorney's fees and expenses of litigation from the balance of the church funds, the court declines to make an award of attorney's fees and expenses of litigation to Defendants from the church funds. While the Conyers Community Church, Inc. was nominally a Defendant, the Plaintiffs in fact represented the interests of the church. The balance of church funds should not be diminished by an award of attorney's fees to the Defendants, and should instead, as a part of the award made by the jury to the Plaintiffs, be disseminated to other non-profit corporations according to law.

This 17th day of June, 1992.

Clarence R. Vaughn, Jr., Chief Judge
Rockdale Superior Court
Rockdale Judicial Circuit

Case No. S91I1236

SUPREME COURT OF GEORGIA

ATLANTA JULY 9, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

KENNETH L. CROCKER et al. v. RAY STEVENS et al.

Fro the SUPERIOR COURT of ROCKDALE County.

Upon consideration of this Application for Interlocutory Appeal, it is ordered that it is hereby denied.

ALL the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Lynn M. Hogg, Deputy, Clerk.

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

RAY STEVENS, PEGGY	:	CIVIL ACTION
STEVENS, DEXTRAL	:	FILE NO. 90-CV-1603
AUSTIN, ROSALYN	:	
AUSTIN, JOHN KIKER,	:	
BENNETTA KIKER,	:	
RAYMOND W. FINN,	:	
CAROLE KAY FINN,	:	
GAIL WOMMACK,	:	
MICHAEL J. WOMACK,	:	
and JERRY DODD,	:	
Plaintiffs,	:	
v.	:	
KENNETH L. CROCKER and	:	
CONYERS COMMUNITY	:	
CHURCH, INC.,	:	
Defendants.	:	

ORDER

The above matter having come before the court on cross-motions for summary judgement filed by the parties, and the court having considered the documents, pleadings, affidavits, transcript, exhibits, and other materials on file; and the court having given due regard to the positions of the parties as expressed in their briefs, theories of recovery, statements of material facts, and as presented in oral argument, the court finds as follows:[*2]

1. Conyers Community Church, as both a corporation and a church, was not a hierarchical church, in the sense that it was subject to determinations by a superior ecclesiastical authority. All parties concede this, and subparagraph (b) of the relevant section of the Articles of Incorporation (Exhibit A to Defendants' Motion) specifically indicates that all ecclesiastical power and authority relative to the Church and its property shall be exercised by the Church's governing authority.

2. Since Conyers Community Church is not subject to hierarchical authority, in the absence of governing statutes, corporate documents, or church organizational documents to the contrary, this court would necessarily be bound to consider the church as governed by a majority of its membership. See e.g., *Gervin v. Reddick*, 246 Ga. 56 (1980); *Heath v. Butler*, 213 Ga. 411 (1987); *Stewart v. Jarriel*, 206 Ga. 855 (1950).

3. However, the Georgia Supreme Court in *Jones v. Wolf*, 244 Ga. 388 (1979), *cert. denied*, 444 U.S. 1080, 100 S.Ct. 1031 (1980), specifically reaffirmed the "neutral principles" test, whereby the presumptive rule of majority representation in a congregational church was defeasible upon a showing that the governance of a local church is to be determined by some other means than majority representation. Such neutral principles consist of such things as State statutes, corporate charters, [*3] organizational constitutions, and relevant deeds. This court finds that such neutral principles exist in this case and that Conyers Community Church, by its election to be governed and organized as a corpora-

tion, has decreed that the provisions of the Georgia Non-Profit Corporation Code, the Defendants' Articles of Incorporation and By-laws, and the minutes and other records of actions taken by Defendant Church pursuant to those governing neutral principles are determinative of not only how the Church was in fact to be governed but also the propriety or impropriety of the property dispositions at issue in this case.

4. With respect to the issue of Plaintiffs' standing, *Jones v. Wolf*, *supra*, indicated that the appropriate concern was not whether certain persons are "true believers" or "adherents to the true faith." "Rather, church documents will be considered only insofar as they determine or assist in the determination of the persons who are 'entitled to possess and enjoy the property....'" *Id.* at 389. As set forth hereinafter, it is clear that the Georgia Non-Profit Corporation Code and certain provisions of Defendant corporation's by-laws provide for vote of the membership in certain circumstances relevant to the issues under consideration. With respect to those issues, legitimate members of Defendant Church/corporation would be entitled to vote and would be persons who have an interest in the property at issue within the meaning of ones v. Wolf.[*4]

5. Similarly, legitimate Church members would have an interest under O.C.G.A. Section 14-5-45 (see *Dowdell v. Cherry*, 209 Ga. 849 (1953) in preventing the diversion of Church property dedicated in trust to specific doctrines or purposes. This court finds that in fact the Articles of Incorporation, as amplified by the objects and purposes of

the Church stated in the by-laws, do impose valid restrictions upon the purposes for which Church property can be used, and accordingly imposes a trust upon those charged with control and disposition of the property and assets of the Church, to use the same in accordance with corporate purposes stated in the Georgia Non-Profit Corporation Code, the Articles, and the By-laws.

6. The only "neutral principle" available to assist the court in determining membership is paragraph 4 of the By-laws of the Corporation (Exhibit B to Defendants' Motion), which bases membership upon acceptance of Jesus Christ as Saviour and Lord and continuation as a disciple of Christ "to take advantage of the means of grace and spiritual development offered by the Church." "Willingness to grow and develop as a Christian shall be the test of membership rather than specific performance in chosen areas."

This test or standard for membership is obviously highly subjective and depends upon the personal commitment and attitude of any individual claiming initial or continuing membership. This court must accordingly be extremely careful [*5] not to violate the First Amendment concerns expressed in *Jones v. Wolf* about who is or is not a "true believer." Most if not all of Plaintiffs have claimed that that did not in fact or did not intend to terminate membership in Conyers Community Church, nonwithstanding the attendance by some of them at other churches after (and in some cases before) the critical meetings in October and December of 1989 and in February of 1990, at which the corporation purportedly took action to authorize the sale of all or substantially all of

the Church assets and to make disposition of those assets. There is also some evidence to the contrary that some of the Plaintiffs had intended to or did terminate membership in Conyers Community Church by resignation or by actions that could be construed to be inconsistent with membership (whether exclusive or not) in Conyers Community Church. The court does not believe that it can speculate concerning these issues without violating First Amendment concerns and it declines to do so. Viewing the matter purely objectively, the court finds that in fact - and without dispute - a number of the Plaintiffs did consider themselves members of the Church up to and though the February 1990 meeting (the final meeting of the Church membership); that continued attendance at other churches by Plaintiffs subsequent to the cessation of structured religious activities by Conyers Community Church is not inherently inconsistent with [*6] membership; and that as such, some if not all of the Plaintiffs have standing under the aforesaid neutral principles to challenge the purported corporate actions taken through February, 1990, just as they would had they been shareholders in a profit-making corporation if they owned stock on the date of the actions complained of. Indeed, even the vote to restrict membership by the Church at one of the critical meetings in 1989 (and challenged by Plaintiffs) acknowledges the membership of some of the Plaintiffs. Accordingly, the court finds that this case is properly before it for decision. Because of the rulings set forth further within, it is unnecessary for the court to determine actual membership, and it is probably inappropriate for the court to do so.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

7. Neither the Articles nor By-laws of Conyers Community Church specified procedures for sale of all or substantially all of Church assets, regardless of whether the challenged sale of Church property involved in this case is viewed as an action prompted by insolvency or a voluntary decision. The Articles and By-laws, fairly construed together in light of the Georgia Non-Profit Corporation Code, do indicate that the Church's Board of Directors would have the authority to make all decisions with respect to property dispositions. The Georgia Non-Profit Corporation Code, at O.C.G.A. Sections 14-3-190, 14-3-191, and 14-3-211, indicates that any decision to sell [*7] all or substantially all assets of the corporation must originate with the Board of and, in some circumstances (unless in cases of insolvency), must be ratified by a vote of two-thirds of the membership entitled to vote.

8. It is a matter of factual dispute whether in fact Conyers Community Church was in a state of insolvency at the time the vote to sell all or substantially all of the assets of the corporation was taken.

9. The corporation's By-laws specify that the Board of Directors shall consist of an even number of members in addition to the Pastor (necessarily, a minimum of three members); that the Board membership shall be determined at an annual or specially call meeting, where at the nomination of Board members by the Pastor would be voted upon by the membership. There is a question of fact as to the composition of the Board, that is, who was in fact a member of the Board and

authorized to act as a Board member. There is a question of fact whether a valid corporate action through a valid vote of the members of the Board of Directors has taken place to authorize either the sale of Church property or the disposition of any of the proceeds of the property subsequent thereto at the relevant meetings in October and December of 1989 and in February, 1990.

10. The Plaintiffs have suggested, if not urged, this court to declare invalid the authorization to sell the Church property in the first place. As found above, that sale was not validly authorized by the corporation. [*8] However, this court is sitting in part as a court of equity with respect to the issues of injunctive relief and the creation of a receivership. It is undisputed that the sale of the Church property has been made to bona fide purchasers for value some months ago and proceeds have been recceived by the Church for those transfers. Because apparently significant harm and damage to the positions of one or more individuals or entities not parties to this litigation would be involved should this court grant Plaintiffs' request in this regard - which this court deems not to be equitable - court declines to do so.

11. There is a question of act whether the gifts and transfers to Kenneth Crocker and his wife and the allocation of the balance of funds of hand to the tape ministry have been properly authorized by the Corporation.

12. There is a question of fact whether the transfers of money and property to the Crockers, consisting of the parsonage in a repaired condition and free of debt and

$100,000.00 in cash, were in accordance with a pension or retirement plan authorized as one of the means of compensation for employees of a non-profit corporation under the Georgia Non-Profit Corporation Code.

13. There is a question of fact whether the real estate commission received by Kenneth Crocker, and the amount, terms, and conditions thereof, were disclosed to either the Board itself (whether properly constituted or not) or the membership and received corporate approval. [*9]

14. There is a question of fact whether the allocation of the funds to the tape ministry, to the exclusion of an organized and established church holding religious services, is consistent with the aims and purposes of the Church as stated in the Articles and By-laws.

IT IS THEREFORE ORDERED that the cross-Motions For Summary Judgment of Plaintiffs and Defendants are denied.

This 28th day of May, 1991.

Clarence R. Vaughn, Jr., Judge
Rockdale Superior Court
Rockdale Judicial Circuit

APPENDIX III

Court of Appeals
of the State of Georgia

ATLANTA, SEPTEMBER 13, 1993

The Honorable Court of Appeals met pursuant to adjournment The Following order was passed:

Case No. A93A0741
KENNETH L. CROCKER V. RAY STEVENS ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta
September 13, 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Victoria McLaughlin, Clerk

APPENDIX IV

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

RAY STEVENS, PEGGY STEVENS, DEXTRAL AUSTIN, ROSALYN AUSTIN, JOHN KIKER, BENNETTA KIKER, RAYMOND W. FINN, CAROLE KAY FINN, MICHAEL J. WOMMACK, GAIL WOMMACK, and JERRY DODD,	:	CIVIL ACTION FILE NO. 90-CV-1603
Plaintiffs,	:	
v.	:	
KENNETH L. CROCKER and CONYERS COMMUNITY CHURCH, INC.,	:	
Defendants.	:	

ORDER

The above styled matter having come on regularly to be heard, the court finds and concludes as follows:

The court finds that there is a substantial probability that the Plaintiffs will succeed in proving at trial that church meetings were held and member votes taken without adequate notice, and that the non-profit corporation as de-

fined by its by-laws and corporate charter has ceased to exist. The court finds that the sale of the building of the Conyers Community Church has resulted in substantial monies which have been disseminated to Mr. and Mrs. Kenneth L. Crocker in the form of the pay-off of a second mortgage in Mr. Crocker's name, a "gift of love and affection" to Mr. and Mrs. Crocker in the amount of $100,000.00, and the real estate sales commission in the amount of $29,000.00. Additionally, there [*2] is a parsonage. There are monies resulting from the sale of personalty as yet unsold. There are the recording equipment and accessories purchased with proceeds from the real property. There may be additional personal property purchased with the sale proceeds. It also appears that there is at least one bank account in the name of Conyers Community Church, Inc. or Community Ministries, Inc. Consequently, the assets of the church must be protected pending a final trial on the merits.

IT IS THEREFORE ORDERED that a preliminary injunction is hereby issued to remain in full force and effect until the trial on the merits, and that the Defendant KENNETH L. CROCKER, MAGDALENE CROCKER, and their agents, employees, and anyone acting in concert with Mr. and Mrs. Crocker, except as noted otherwise *supra* are hereby enjoined from disseminating, transferring, spending, encumbering, secreting, and consuming the following:

1. The $100,000.00 "gift of love and affection" to Mr. and Mrs. Kenneth L. Crocker;

2. The sum of approximately $328,895.65, whether held in the name of Conyers Community Church, Inc., Community

Ministries, Inc., Kenneth Crocker, or Magdalene Crocker;

3. The monies paid in satisfaction of the second mortgage held by Kenneth Crocker in the amount of $156,616.37; [*3]

4. The real estate commission paid to Kenneth Crocker in the amount of $29,000.00;

5. The parsonage at 1795 Laurel Ridge Drive, Conyers, Rockdale County, Georgia 30207;

6. Any checking account, savings account, certificate of deposit, money market account, or any other deposit with any banking or savings and loan institution in the name of Conyers Community Church, Inc., or Community Missions, Inc.;

7. The monies from the sale of Conyers Community Church's personalty, whether on deposit in any financial institution or in cash;

8. The remaining personalty belonging to or on loan to Conyers Community Church, Inc.; and

9. The recording, taping, radio and electronic equipment, audio tapes, tape mailers, computer system and any other equipment or personal property purchased from the proceeds of the sale of the church building of the Conyers Community Church, Inc., including any home furnishing purchased for the parsonage.

IF IS FURTHER ORDERED THAT Robert W. Maddox is hereby appointed to act as receiver pursuant to O.C.G.A. Sections 14-3-219 and 14-3-220 to collect and hold the following asset of the corporation pending final trial on the merits:

The sum of approximately $328,895.65, whether held in

the name of Conyers Community Church, Inc., Community Ministries, Inc., Kenneth L. Crocker, or Magdalene Crocker. [*4]

IT IS FURTHER ORDERED that KENNETH L. CROCKER may take possession of and use an amount not to exceed three thousand ($3,000.00) dollars per month from the account comprised of the proceeds from the second mortgage in the amount of $156,616.37, effective May 1, 1990;

IF IS FURTHER ORDERED THAT KENNETH L. CROCKER and MAGDALENE CROCKER may reside in the parsonage located at 1795 Laurel Ridge Drive, Conyers, Rockdale County, Georgia 30207, pending a final trial on the merits. However, KENNETH L. CROCKER and MAGDALENE CROCKER, and their agents and employees are hereby restrained and enjoined from wasting, transferring, conveying, encumbering, or selling the parsonage and the fixtures and furnishings of the parsonage purchased with funds from Conyers Community Church, Inc., or with funds from any of the accounts enumerated, *infra*.

This 6th day of June, 1990.

_____

Clarence R. Vaughn, Jr., Judge
Rockdale Judicial Circuit

APR 1 1994
OFFICE OF THE CLERK

NO. 93-1429

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CONYERS COMMUNITY CHURCH, INC. AND KENNETH L. CROCKER,

Petitioners,

v.

RAY AND PEGGY STEVENS, DEXTRAL AND ROSALYN AUSTIN, JOHN AND BENNETTA KIKER, RAYMOND W. AND CAROLE KAY FINN, GAIL WOMMACK, AND JERRY DODD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

Respondents totally disagree with the formulation of issues and questions presented, as set forth by Petitioners in this portion of their brief and in the sub-headings of issues throughout their brief. Respondents believe that the true statement of questions presented to this Court is as follows:

1. Is the jurisdiction of this Court properly invoked upon this application for writ of certiorari, when the highest court of the state involved (the Supreme Court of Georgia) has three times declined to review the merits of the case, and where the lower courts relied upon the "neutral principles" test announced by this Court as governing inquiry into church affairs?

2. Does the First Amendment preclude inquiry into the actions of a minister and other members of the governing board of a non-profit corporation, who by fraud and conflict of interest obtained virtual control of all assets of the corporation, because the corporation involved happened to be a church?

3. When a church voluntarily opts for corporate status under the laws of a state and thereby elects to be governed and protected by the state's statutory scheme applicable to non-profit corporations, are the activities of that church in diversion of assets contrary to corporate purposes stated in its articles of incorporation and in violation of significant provisions of the governing state corporate statutory framework, whose governance the church itself had chosen, immune from judicial inquiry by virtue of the First Amendment, solely because the corporation is a church?

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A. PRELIMINARY STATEMENT

Respondents respectfully request that this Court decline to issue the Writ of Certiorari sought by Petitioners.

This is a routine corporate fraud case, in which the governing board through deception, concealment, and other fraudulent activity manipulated its own membership, and the composition and approval of the membership of the corporation, to divert assets from stated corporate purposes and in a manner violative of the state's statutory scheme governing non-profit corporations. The case is distinguished, if at all, from other cases of corporate fraud and insider dealing only by the facts that the corporation involved was a church; the prime mover, manipulator, and beneficiary of the fraudulent activity was the minister of the church; and the church, while clearly not hierarchical, was not congregational either, since the articles of incorporation, by-laws, and governing state statutes provided that the corporation would be governed in most respects by the church's board of directors, also known as trustees, as distinct from the congregation.

As the Georgia Court of Appeals found (Petitioner's Brief, Appendix I), the trial court scrupulously adhered to the neutral principles test developed in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601 (1969) and *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020 (1979). *See also*, on remand, *Jones v. Wolf*, 244 Ga. 388, 260 S.E. 2d 84 (1979), *cert. denied*, 444 U.S. 1080, 100 S.Ct. 1031 (1980).

The highest court of the state, the Georgia Supreme Court, three times declined in this case to review the decisions of the inferior courts: Upon Petitioners' application for interlocutory appeal from the denial by the trial court of their motion for summary judgment (Petitioners' Brief, A-26, A-27 through A-34); upon transfer of consideration of the appeal after trial by the Georgia Court of Appeals (Petitioners' Brief, A-20, A-21 through A-22); and finally upon application of the Petitioners to the Georgia Supreme Court for a writ of certiorari from the decision of the Georgia Court of Appeals (Petitioners' Brief, A-19). It is respectfully submitted that under ordinary circumstances the very fact that the highest court of a state has so many times declined to review or find fault with the decisions of its inferior courts in application of this Court's decisions strongly suggests that this case does not merit review by this Court.

This case presents nothing novel or noteworthy warranting this Court's consideration. Contrary to Petitioners' contentions, the application of the neutral principles test to the somewhat different organizational format of Conyers Community Church, Inc., scrupulously and cautiously applied by both the trial court and the Georgia Court of Appeals, does not violate the First Amendment, or create a case of first impression, or result in harm to the Petitioners, except to the extent that it thwarted the results of their fraudulent activities.

As this Court noted in *Jones v. Wolf, supra* at 603, 99 S.Ct. at 3025, the neutral principles test is flexible enough to accommodate all forms of religious organizations. That is its value in settlement of property disputes such as the present one. As the statement of facts hereinafter shows, there was simply no inquiry into any aspect of religious doctrine or liturgy involved.

As this Court further recognized in *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368, 90 S.Ct. 499, 500 (1970), unless there is a finding of improper inquiry into religious doctrine — which the neutral principles test is designed to avoid — there is a lack of jurisdiction for want of a substantial Federal question.

Petitioners simply have not shown that the state courts deviated from or misapplied controlling constitutional decisions of this Court.

B.
STATEMENT OF THE CASE

This case is about a preacher (Kenneth Crocker) who, upon sale of all property belonging to the church corporation to which he ministered (Conyers Community Church, Inc.), dissolved the church as such and effectively converted all assets and money to his own use. He did this by a pattern of manipulation of the governing board and its membership, and the membership of his congregation. He misstated, even forged, purported board and congregation meeting minutes

(e.g., ¶3, Defendants' Exhibit 15; Defendants' Exhibit 19, T. Vol. VI).[1] He concealed relevant facts and misrepresented others; he had secreted funds for his own use for a number of years. Although Crocker and the corporation were the only named defendants (the only entities holding church assets), Respondents alleged that Crocker, abetted by the other two members of the then purported governing board (Ron Jansen, Crocker's son-in-law, and Robert Withers, a "yes-man," see T. 547), perpetrated fraud, acted in conflict of interest, and breached his fiduciary duty to the church. The jury so found.

At first blush, the verdict (R. 612-13) seems to support the conclusion that Crocker won more than he lost, but not so. A careful reading of the record will show that Crocker was allowed to keep those assets, and only those assets, about the disposition of which the church membership including Respondents (whether all were members or not) were fully informed and to which the Respondents did or would have consented — to wit, a portion of the corporate debt to Crocker reflected by a second mortgage on the church property (Defendants' Exhibits 6, 8, 63, 82, 23, T. Vol. VI), the parsonage with the debt paid off by the corporation, and a retirement "gift" of $100,000.00 for love and affection (T. 563). *All* other assets of the corporation remaining after dissolution were awarded to Respondents — not for their own benefit, but for distribution by the trial court in accordance with purposes consistent with the corporate charter. And as against the moneys awarded to Crocker, the jury found for the Respondents on the issue of attorney's fees

[1] References are to the trial transcript, record, and exhibit numbers.

and litigation costs in the amount of $30,000.00, due to his aggravated conduct.

Conyers Community Church, Inc. was incorporated as a completely independent church on December 30, 1976 (Defendants' Exhibit 1, T. Vol. VI). The charter provided that all corporate affairs would be entrusted to a board of trustees (directors), not less than three nor more than twelve in member, who would serve for indefinite terms and which board would itself determine its own membership, electing or removing members by majority vote (*id.*, ¶5). Crocker, Respondent Ray Stevens, and Crocker's brother were named as the initial board (*id.*, ¶8).

This board was constituted of an even number plus the pastor (Crocker), who was to remain a permanent member, and its membership was to be determined by pastoral appointment, ratified by the church (not board) membership. A so-called "board of trustees," subject to the pastor or directors, would do nothing more than hold church property (compare Defendants' Exhibit 1, ¶s 5 and 6, with Defendants' Exhibit 2, ¶s 4 and 5, T. Vol. VI; T. 456).

By 1984 at least, Crocker had so manipulated and/or ignored these corporate grants of authority (see T. 456-58) as to declare himself totally in charge of all corporate as well as church affairs (extending his stated spiritual authority, Defendants' Exhibit 2, ¶5, to all temporal matters) and relegating the governing board to an advisory capacity only (Defendants' Exhibit 15, ¶s 3, 5, 6, T. Vol. VI; see T 469-70).

On December 13, 1987, Crocker unilaterally (T. 422) declared all church offices vacant, including membership

on all boards, in conflict with both the articles of incorporation and the by-laws (Defendants' Exhibit 19, T. Vol. VI). He specified that new board members would be appointed by him and ratified by the church membership (consistent with the by-laws, but inconsistent with the articles); he also specified requirements for membership on the board of directors not stated in any of the corporate documents, including a willingness to "create and implement a retirement program for the Pastor and his wife." Crocker than "appointed" four members to the governing board. (These four, but not Jansen, would be eventually "approved" as board members by church membership vote at a meeting on January 14, 1988. Plaintiffs' Exhibit 889, T. Vol. VI. Jansen was only a deacon.) Respondents contended at trial that from at least this point forward, the corporation had no legitimate governing board.

Handwritten marginal notes by Crocker on the December 13 minutes indicate that not all offices were vacant, but that Withers and Jansen "remained" trustees (Defendants' Exhibit 19, T. Vol. VI). Later, in minutes of a purported meeting held February 20, 1988, Ron Jansen along with the four members allegedly appointed by Crocker on December 13, 1987, were declared all to be "trustees and members of the Board of Directors of Conyers Community Church, Inc." Defendants' Exhibit 25, T. Vol. VI). However, these later minutes were not signed by the board members as earlier minutes had been. Respondent Ray Stevens testified that the handwritten notes by Crocker on the December 13 minutes did not appear on the typed minutes when signed by the purported board, did not reflect what in fact occurred at the meeting, that Jansen (who had moved to Ohio) was

not a member of either board, that his appointment to the board (if it ever took place) was never ratified by the board membership or the church membership, and that both the handwritten marginal notes and the February 20 minutes were, in effect, forgeries (T. 466-67; 471, 475, 481, 484).

After early 1988 and before the critical decision to sell the church property and make disposition of the proceeds in late 1989 and early 1990, the evidence shows that Neil Allen effectively resigned as a board member (he moved away) and Robert Mitchell was either "removed" or resigned over a disagreement with Crocker (T. 507-09; 516-18). If and to the extent that any board then existed, this left Ray Stevens, Bob Withers, Crocker and (according to Crocker and Jansen) Jansen on the board. Thereafter, Ray Stevens was forced out over disagreements with Crocker, largely due to Crocker's refusal to return a borrowed piano, which Crocker claimed was a gift but which the owner claimed was only a loan (T. 1552-53; Plaintiffs' Exhibit 86, T. Vol. VI).

This left, at best, a board (if any existed) consisting of Crocker, his son-in-law Jansen, and Withers, who was not about to disagree with Crocker and raised no conflict of interest issue in the subsequent purported board action in favor of Crocker (T. 1410-11, 1594). The jury was authorized to find, even if Crocker and Withers belonged on a board, that Jansen did not, such that the board had only two members, in direct conflict with the minimum number of members required by the articles and by-laws. Also, the jury could readily find from this pattern of activity a fraudulent manipulation of the governing board by Crocker. The eventual votes concerning

disposition of all church assets in Crocker's favor, in which Crocker and Jansen participated, could be readily found to be in conflict with the fiduciary obligations of the board and their duties to the church and its chartered purposes.

At the same time as Crocker was playing his board games, there was ample evidence from which the jury could find that Crocker drove away, expelled, cowed, or neutralized church members who disagreed with him (T. 546, 548, 559-60, 569, 613-14, 622-23, 718-20), leaving him in effective total (Defendant's Exhibits 30, 98, 104, 99, T. Vol. VI) control of the board and a substantial majority of the church membership at the relevant time. This culminated in actions taken to purge and limit the membership roster in December 1989 (Defendants Exhibits 47 and 46, T. Vol. VI). (Note: The issue of who was not a member entitled to vote [if any were] was not challenged at trial by Respondents, to avoid First Amendment problems, since membership per the by-laws was determined on spiritual grounds. The manipulation, not the membership, was the issue (see *e.g.*, T. 546, 548; 559-60, 569)).

Throughout recent years, Crocker had also taken control of church finances. This made it possible for Crocker to create and keep secret the so-called "insurance account," the funds from which Crocker used for his personal benefit without church knowledge or approval (T. 459-64; see Plaintiffs' Exhibit 41, seriatim R. 634-54; 820-48).

On October 3, 1989, Crocker sent a notice to church members of a special meeting to be held October 8, 1989, to consider sale of the church property (Defendants' Exhibit 39, T. Vol. VI). In the letter Crocker represented that

> [T]his sale could make it possible for us to clear all church indebtedness, *with the exception of the parsonage*, and still leave us with enough money to build a new, more functional building in a residential area.
>
> If we keep the building program small like we have at present we should be able to buy new property, build a nice building, increase our Sunday school space, plan for a choir, larger and more practical fellowship hall, and do it without going into debt. We could also plan for a small gymnasium later on where we could develop some badly needed youth programs.
>
> Every church should have a missionary program.... The pastor would like to see *7% of this money* put in a special "missionary trust fund...."

(*Id.* Emphasis added). This is in fact the plan that the church members thought they were voting for when the sale of the church property was approved (T. 565). In fact, however, Crocker had already decided to retire; had planned this as his reason for sale of the property in *early September* because of alleged poor health and declining membership; had already arranged for a real estate commission split for himself; and a buyer was already lined up *before* the October 3 notice of meeting

was ever sent (T. 1298, 1299, 1302, 1303-004). The jury thus could readily find that Crocker intentionally and fraudulently misrepresented the purposes for the sale.

Moreover, when the proceeds of the sale were disposed of, contrary to Crocker's representations of October 3, all debt on the parsonage would be paid off and funds consisting of over 30% of the net proceeds, not 7% (in fact, all funds remaining after other payments to Crocker) would end up in Crocker's control for purported missionary purposes (Defendants' Exhibit 52, T. Vol. VI).

When at one of the meetings of the church concerning sale and disposition of the church property, Crocker was questioned about any real estate commission he would receive, he related that it was not any business of the inquirer (T. 566, 568-69). Thereafter, he would falsify by retyping a purported closing statement so as not to show the amount he would receive ($29,000.00) and misrepresenting the number of realtors involved (compare commission listing on the real estate closing statement, Defendant's Exhibit 87, with the falsified one, Plaintiffs' Exhibit 46, T. Vol. VI).

The final meeting of the church membership was held on February 18, 1990 to finalize disposition of remaining assets, after which the church would be disbanded. Prior to that meeting, a purported board meeting by conference call took place on February 15 between Crocker, Withers, and Jansen. This "board" voted unanimously, and without any abstentions, to give the Crockers a gift of love and affection of $100,000.00; to repair the parsonage and give it debt free to the Crockers; and to allocate the balance of the money

to the control of Crocker and his board for radio, tape, and other missionary work (Defendants' Exhibit 32, T. Vol. VI). The results of this meeting were then presented to the membership on February 18 as an accomplished fact and that their approval or disapproval was not even necessary (T. 546), although approval from the purged and restricted membership was obtained (Defendants' Exhibit 52, T. Vol. VI).

C.
ARGUMENT

I. NO ISSUE OF RELIGIOUS DISPUTE WAS SUBMITTED TO THE TRIAL JURY OR CONSIDERED BY THE STATE COURTS.

Contrary to Petitioners' contentions, as shown by the Statement of Facts, the whole inquiry at trial was whether the actions of Crocker and the church corporation were legitimate corporate actions, as measured by the articles of incorporation, the by-laws, and the governing provisions of Georgia's Non-Profit Corporation Code. Contrary to what Petitioners contend, it was not necessary nor appropriate for the trial court to determine the membership in the church (*see* Petitioners' Brief, A-30 and A-31), and it did not do so. Only two votes of the church membership might have any bearing at all. The membership voted with respect to the approval of disposition of the assets at the final meeting of the corporate membership after which the church was to be disbanded, but the disposition on sale of all or substantially all assets of a non-profit corporation is a determination to be made by the board of directors under the church's articles of incorporation and under

the applicable provisions of corporate law. O.C.G.A. §§14-3-190, 14-3-191. Thus, the membership vote (and membership composition) was not at issue, as indeed the congregation was told. The second vote by the membership (which was an issue) was whether or not there was ratification by the membership of the pastor's appointment of board members in accordance with the articles of incorporation and/or the by-laws, but this matter of voting did not involve the composition of the membership, but only whether there was any vote at all for ratification of the pastor's appointment of the board members who finally acted with him to divert church assets. Thus, no redetermination by the courts of who were or were not members of the church was involved in either decision.

Similarly, the primary focus of the jury in deciding this case was not upon the particular composition of the church board, nor was the jury required or authorized to make any redetermination of that board membership. The issues submitted to the jury under the articles, by-laws, and applicable state law governing corporations were whether the board acting to dispose of church assets was validly selected, and whether the board selected acted fraudulently, in conflict of interest, and contrary to the corporate purposes stated in the articles and otherwise allowable by law.

Similarly, it was not how the assets were to be used, for one religious purpose or another, that the jury was asked to consider; it was only asked to consider the propriety of the manner in which this disposition took place in terms of the articles of incorporation, by-laws, and governing statutory provisions.

Had the church in this case not itself chosen to submit itself to secular standards of organization and government by choosing to become incorporated under the Georgia Non-Profit Corporation Code and enacting required articles of incorporation and by-laws under that Code; and had the church not thereby chosen to be protected by and governed by state law insofar as the propriety of its activity was concerned, then Petitioners' argument might have more merit. (For example, it is indeed doubtful whether inquiry could be made into the decision by the church initially for incorporation versus non-incorporation.) But Petitioners cannot be heard to complain when their actions are measured by the very same standards they themselves chose to be governed by. It is for that reason that Petitioners' reliance upon the quoted portions of the decisions in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601 (1969); *Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020 (1979); and *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) on pages 9 through 15 of its brief is inapposite, as is their restatement of much of the law on the same pages relating to congregational churches (which this was not, as Petitioners concede in footnote 7 on page 13 of their brief). The inquiry in this case was not into internal matters of ecclesiastical governance of a church in accordance with its internal law, but rather the measurement of the activities of a non-profit corporation as to its compliance with external statutory standards regulating all corporations of the class of which the church, by its own decision, had become a member. As the Georgia Court of Appeals noted, "Civil courts do not inhibit free exercise of religion by opening their door to disputes involving church property." *Presbyterian Church in the*

United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra at 449, 89 S.Ct. at _____. Petitioners' Brief, A-5.

As this court noted in *Jones v. Wolf, supra* at 602, 99 S.Ct. at 3025, "[A] state may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." The state has a legitimate interest in resolving church property disputes peaceably and may use its civil forums for that purpose. *Id.* The only limitations imposed by the First Amendment are (1) that the resolution of property disputes cannot be based upon religious doctrine or practice, and (2) the courts must defer to resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. *Id.* The instant case did not involve in any way resolution of issues of religious doctrine or polity, nor were any of the decisions made by the lower courts or the jury based upon any religious doctrine or practice, but solely upon corporate documents and governing corporate statutes. No deference to any religious authority is required in any property dispute where there is no doctrinal issue involved. *Jones v. Wolf, supra* at 603, 99 S.Ct. at 3025.

II. THE GEORGIA COURTS HAVE NOT CREATED A "THIRD-CLASS" CATEGORY OF CHURCHES NOR LEFT ANY CHURCHES UNPROTECTED BY THE FIRST AMENDMENT.

Inconsistent with their own argument elsewhere in their brief (Petitioners' Brief, p. 13 n. 7), the facts in this case, and the decision of the Georgia Court of Appeals

(Petitioners' Brief, A-5), Petitioners argue that "[i]ndependent churches such as Petitioners...are by definition congregational churches" (Petitioners' Brief, p. 19), apparently in an attempt to bring this case within the ambit of decisions in Georgia and by this Court, which indicate that inquiries into decisions by church congregations, when such are the governing bodies, are generally precluded. This contention is specious at best and deceptive at worst. Conyers Community Church, Inc. was governed by its Board of Directors, not by the congregation, as determined by the church's own articles of incorporation and by-laws and, as to the disposition of assets in dissolution, since consistent with those documents, the provisions of O.C.G.A. §§14-3-190 and 14-3-191. Measured by those neutral principles, Crocker and his hand-picked board fraudulently diverted assets, since the board was not properly constituted in the first place, the congregational was deceived and misled, and the board acted in conflict of interest and contrary to the corporate purposes stated in the articles of incorporation. Yet Petitioners argue that inquiry into this fraud is constitutionally precluded and amounts to a "redetermination" of church decisions. Nothing in any decision of this court immunizes fraudulent corporate activity from judicial scrutiny by any impenetrable barrier imposed by the First Amendment. *Jones v. Wolf, supra* at 602-03, 99 S.Ct. at 3025-26.

Petitioners' argument that since Conyers Community Church was not hierarchical and was locally controlled, it must be congregational, and therefore immune from inquiry under the neutral principles test, simply begs the question. No Court is going to allow purported corporate officers to effectively steal

property under the guise of religious freedom. Petitioners have simply not shown why in fact or in law the application of the *Jones v. Wolf* standards in this case is constitutionally impermissible, harmful, or wrong.

III. THIS CASE IS NEITHER ONE OF FIRST IMPRESSION, NOR DOES IT INVOLVE FORCING A THEN ACTIVE CHURCH INTO RECEIVERSHIP.

The final meeting of the church resulted in the disbanding of all church membership and effective control of all corporate assets by Kenneth Crocker. The jurisdiction of the trial court was invoked pursuant to O.C.G.A. §14-3-219 to enjoin disposition of the assets and to place them in the effective control of a receiver pending the outcome of the litigation. Respondents alleged that the diversion of assets by Crocker and his purported board of directors was fraudulent and illegal, resulted in the misapplication of those assets, and that the corporation, being functionally disbanded, could not carry out its original corporate purposes. Petitioners have essentially cited no authority here, or in the courts below, that would preclude the state courts, under First Amendment principles or otherwise, from taking steps upon an appropriate showing to prevent the alleged illegal disposition or waste of corporate assets as was done in this case (*see* Petitioners' Brief, A-36 through A-39). *Jones v. Wolf, supra* at 602, 99 S.Ct. at 3024. The receiver was not, as Petitioners contend, selected to "run" a church, since there was no church at this point. Rather, he was instructed to preserve assets.

Petitioners further argue that somehow the "implied trust" theory to prevent a departure from doctrine was improperly used in this case pursuant to

Georgia statute. However, as the Court of Appeals found, and as Respondents had contended in the Court below (Petitioners' Brief, A-9), the doctrine of implied trust related to the allegations of imposing a constructive trust upon the assets in Crocker's hands obtained by fraud and manipulation, not to the assets in the hands of the church, about which assets the decision related only to whether there was a diversion contrary to corporate purposes. And that is the true distinction which Petitioners failed to grasp in this case: Diversion of assets by fraud and manipulation contrary to corporate purposes is entirely distinct from internal church decisions uninfluenced by fraud and manipulation as to the application of those assets in furtherance of one religious doctrine or another. The inquiry in the present case had nothing whatsoever to do with religious doctrine, only with fraud and deception.

CONCLUSION

For all the above and foregoing reasons, Respondents contend that this Court should not exercise jurisdiction in this matter, that a writ of certiorari is inappropriate and should not be issued, and that the application should be denied.

Dated April 1, 1994.

Respectfully submitted,

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APPENDIX

APPENDIX

Appendix I: Corporate purposes stated in Petitioner's Articles Of Incorporation 2a

Appendix II: Table of most relevant state statutes applied under the "Neutral Principles " Test 4a

APPENDIX I

Corporate Purposes Stated In Petitioner's Articles of Incorporation

(a) To establish a biblical Christian church congregation with a Sunday school, literature and educational department and to establish and maintain a world missionary program and all other departments it may deem useful to propagate and practice the full Gospel of Jesus Christ and for its service to the community, and pursuant thereto to license and ordain Christian Workers and Ministers and Missionaries and to plant and establish branch and indigenous churches.

(b) To perpetually protect this local church corporation in its ownership and control of its property and its sovereignty under Christ; therefore, all ecclesiastical power and authority relative to his church and its property shall be exercised by a board of trustees and the decisions thus made are subject to no reversal nor amendment by any other ecclesiastical body whatsoever.

(c) To own, maintain and operate buses, automobiles and airplanes for the transportation of officials, and personnel of the corporation and for the furtherance of the business of said corporation.

(d) To have authority to maintain, publish, print and circulate religious literature.

(e) To do any and everything necessary and proper for the establishment of the object of the corporation, and in general to carry on any lawful business necessary or incidental to the attainment of these objectives.

APPENDIX II

Table Of Most Relevant State Statutes Applied Under The "Neutral Principles" Test

(Petitioner Conyers Community Church was incorporated under the laws of the State of Georgia under the name of "Conyers Community Church, Inc." on December 30, 1976, pursuant to the Georgia Non-Profit Corporation Code, O.C.G.A. §§14-3-20 et seq (previously Ga. Code Ann. §§22-2201 *et seq.*, 1968 Ga. L. 565 *et seq.)*

O.C.G.A. §14-3-180 providing that religious doctrine shall govern as constitutionally required when that doctrine is inconsistent with other provisions of the Corporation Code.

O.C.G.A. §§14-3-21(b) and (d) providing for pension plans, as limited by other Code sections and the articles of incorporation.

O.C.G.A. §14-3-21(b)(2) authorizes the making and alteration of by-laws not inconsistent with the corporation's articles of incorporation.

O.C.G.A. §14-3-21(b)(13) authorizes a non-profit corporation to make donations for religious, charitable, and other such purposes, but provides no authority for gifts to individuals.

O.C.G.A. §14-3-80(a) provides for voting rights and other rights of members in a non-profit corporation and specifies that they shall be only as set forth in the articles of incorporation or by-laws.

O.C.G.A. §14-3-82(a) and (e) provide that voting rights by members shall only be as conferred by the articles and by-laws and where the members have no right to vote, the directors shall have the sole voting power.

O.C.G.A. §§14-3-100 and 14-3-101 provide for management of the corporation by a board of directors initially named in the articles and provide that subsequent board membership shall be as determined by the articles of incorporation or the by-laws.

O.C.G.A. §14-3-103 provides for filling of vacancies on the board of directors as being governed by the articles or by-laws, and providing for a statutory scheme where no provision is made otherwise.

O.C.G.A. §14-3-111(a), obligating a corporation to maintain at its registered office a record of the names and addresses of members entitled to vote.

O.C.G.A. §§14-3-191 and 14-3-190, which provide for the disposition of property and assets of the corporation in the event of sale of all or substantially all of the property; provision for authority to make disposition; and providing for responsibility for decision-making in this regard, depending upon whether the corporation is insolvent or not.

O.C.G.A. §§14-3-191 and 14-3-211 governing notices of special meetings.

O.C.G.A. §14-3-219, empowering the trial court to liquidate assets and enter into the affairs of a non-profit corporation when the actions of those in control of the corporation are legal or fraudulent, to prevent waste, or when the corporation cannot fulfill its purposes.

O.C.G.A. §14-3-220 authorizes the trial courts to issue injunctions and appoint receivers as needed to preserve corporate assets.